United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1903.

No. 1273. 200

EDWIN T. MORRIS, EDLAR B. BLANTON, WILLIAM G. MAXWELL, PHILLIPS WITHERSPOON, ISAAC H. HARNESS, THOMAS PEERY, R. L. GLOVER, J. B. SPRAGINS, C. M. KEYES, AND MILTON E. IKARD, APPELLANTS,

vs.

ETHAN A. HITCHCOCK, WILLIAM A. JONES, J. GEORGE WRIGHT, AND J. BLAIR SHOENFELT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 17, 1903.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 27, 1903.

In the Court of Appeals of the District of Columbia

EDWIN T. MORRIS ET AL., Appellants,
vs.
ETHAN A. HITCHCOCK ET AL. } No. 1273.

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a Supreme Court of the District of Columbia.

EDWIN T. MORRIS, EDLAR B. BLANTON, William G. Maxwell, Phillip S. Witherspoon, Isaac H. Harness, Thomas Peery, R. L. Glover, J. B. Spragins, C. M. Keyes, and Milton F. Ikard, Complainants,
vs.
ETHAN A. HITCHCOCK, WILLIAM A. JONES, J. George Wright, and J. Blair Shoenfelt. } No. 23477. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Complaint..*

Filed August 19, 1902. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

EDWIN T. MORRIS ET AL.
vs.
ETHAN A. HITCHCOCK ET AL. } Equity. No. 23477.

The bill of complaint of Edwin T. Morris, Edlar B. Blanton, William G. Maxwell, Phillip S. Witherspoon, Isaac H. Harness, Thomas Peery, R. L. Glover, J. B. Spragins, C. M. Keyes and Milton F. Ikard, plaintiffs, against Ethan A. Hitchcock, William A. Jones, J. Geo. Wright and J. Blair Shoenfelt, defendants, complains and says:—

I. That plaintiffs and defendant- are citizens of the United States and not members of any tribe of Indians, and that plaintiffs Morris, Blanton, Maxwell and Witherspoon are residents of Gainesville,

Cooke county, Texas; that plaintiffs Peery, Glover, Harness and Ikard are residents of the town of Chickasha in the Chickasaw nation, Indian Territory; that plaintiff Spragins is a resident of the town of Ardmore in said nation and that the plaintiff Keyes is a resident of Kansas City, in the State of Missouri; and that plaintiffs sue in their own right, and for their own use and benefit, and for the use and benefit of all others owning and holding cattle and horses in said Chickasaw nation upon like terms and conditions as the plaintiffs.

II. That defendant- Hitchcock and Jones are residents of the District of Columbia, and that the defendants Wright and Shoenfelt are residents of the city of Muscogee, in the Indian Territory,

but can be found in said District of Columbia; and that said
2 defendants are officers of the United States, the defendant Hitchcock being Secretary of the Department of the Interior, the defendant Jones Commissioner of Indian Affairs, the defendant Wright Indian inspector and the defendant Shoenfelt United States Indian agent at said city of Muscogee.

III. That each of the plaintiffs is the owner of cattle and horses, no one of them owning less than five hundred head, and some of them owning exceeding one thousand head, situated and grazing upon land in said Chickasaw nation under contract with individual members of the Chickasaw tribe of Indians, which land is, and has been, held, used and claimed by such individual Indians as their approximate shares upon allotment, which cattle and horses are so held upon terms satisfactory to the individual Indians claiming such lands; the bulk of which cattle and horses were bred and raised in said nation, and have never been elsewhere, and many of them were acquired by plaintiffs by purchase from members of said tribe, but some of said cattle and horses have been introduced into said nation during the present year, and that there are now exceeding one hundred thousand cattle and horses located in said nation and owned and held by citizens of the United States, not members of said tribe, upon like terms and conditions as plaintiffs' cattle and horses are so held; which cattle and horses exceed in value the sum of fifteen dollars per head.

IV. That there is not now, and for the last four years there has not been, any public domain in said nation, but practically all of the lands in said nation have been, and are now, enclosed, claimed and occupied by individual members of said tribe as their approximate share upon allotment, and over the lands so enclosed and held

the tribe is, and has been, without jurisdiction or control.
3 V. That the legislature for said tribe on May 3rd, 1902, enacted the pretended statute entitled "An act to prescribe privilege or permit taxes and define the manner of their collection," thereby seeking to impose an annual tax of twenty-five cents per head upon all cattle and horses in said nation not belonging to members of the tribe, which statute is set forth in the regulations herewith filed, marked "Exhibit A" and made a part of this complaint; and thereafter, on the 3rd day of June, 1902, Honorable Thomas

Ryan, acting Secretary of the Interior, wrongfully seeking to put said statute in force, promulgated in behalf of the Interior Department the regulations set forth in said exhibit; which pretended tax the plaintiff and other citizens of the United States have refused, and still refuse, to pay, because they believe the same to be illegal and unauthorized.

VI. That plaintiffs are advised and believe that said Chickasaw legislature is without dominion or jurisdiction over the person or property of plaintiffs and said other citizens of the United States, who are not members of said tribe, and is without power to enact laws controlling the action of any one except a member of the tribe, and that for the last fifty years said tribe has been without jurisdiction or power to impose taxes or burdens upon any one not a member of the tribe; and that plaintiffs and other citizens of the United States residing or holding cattle and horses in said nation are amenable to the laws of the United States enforced therein, but no other or different laws, and are entitled to all of the rights guaranteed by the Constitution of the United States, and they are therefore advised and believe that the aforesaid statute is illegal and void and a wrongful attempt upon the part of the Chickasaw Indians to usurp
4 and exercise legislative jurisdiction and dominion over persons in no manner subject to their jurisdiction; and the plaintiffs are in like manner advised and believe that defendant Hitchcock, as Secretary of the Interior, is but a ministerial officer, clothed with no power to legislate or to impose taxes or burdens, or to enforce the same when imposed, and that the seizure and removal of the cattle and horses of plaintiffs and other citizens of the United States without warrant or judicial investigation, or opportunity for the same, as contemplated in said regulations, is, and would be, illegal and repugnant to the fourth and fifth amendments to the Federal Constitution.

VII. That the defendants, combining and confederating, together, are proceeding to enforce said statute and regulations, and are threatening to forcibly seize, hold, and drive and remove the cattle and horses of plaintiffs and said other citizens of the United States from said Chickasaw nation, thereby not only disregarding the rights of plaintiffs and said other citizens, but breaking and invading the close of the individual member of said tribe, and interfering with his use, possession and enjoyment of his approximate allotment and depriving him of his right to use the same in such a manner as in his judgment best promotes his individual interests; but the defendants wrongfully seeking justification for said statute and regulations pretend that as said cattle and horses graze upon lands in the Chickasaw nation, the plaintiffs and other citizens of the United States are under moral obligation to pay the tribe for the use of said land; but plaintiffs say this pretense is unfounded, for the payment of said pretended tax confers no right to either grass or water, and that in order to obtain grass and water for
5 said cattle, plaintiffs and said other citizens of the United States have been forced to pay and do pay the individual

Indian claimant the full market value of the use and possession of said lands, and that said statute and said regulations are not attempts to obtain value for anything given or received, but are enacted and promulgated upon the erroneous assumption that the Chickasaw legislature and the Secretary of the Interior are clothed with the full power of legislation, with the right to impose such burdens as they deem fit upon those who are not members of said tribe, and to enforce them by arrest and seizure without warrant and by banishment and removal without judicial hearing or trial, or such other unrepublican and despotic methods as they may desire to employ:

VIII. That the enforcement of said statute and regulations in the manner aforesaid would not only result in a multiplicity of suits and almost endless litigation, but would injure said cattle and horses, and deprive them of water and grass and throw them upon the hands of their owners at a time when they have no means of caring for the same, or providing them with feed or pasture, thereby forcing such owners to dispose of said cattle and horses at a ruinous sacrifice and when they are not in a condition to be marketed, and when there is little or no demand therefor, and thereby plaintiffs and said other citizens of the United States similarly situated would suffer irreparable loss and damage, for which they have no adequate remedy at law.

Wherefore the plaintiffs pray that the defendants, their agents and attorneys, be restrained and enjoined from seizing, molesting or removing the cattle and horses of plaintiffs and said other citizens of
6 the United States located in said Chickasaw nation under or by virtue of said statute and regulations, and upon final hearing plaintiffs pray that said injunction be made perpetual, and that said statute and regulations be adjudged void, and that they may have such other and further relief as they are entitled to; to which end plaintiffs pray that process may issue requiring the defendants to appear and answer the exigencies of this bill.

RALSTON & SIDDONS,
DAVIS & GARNETT,
Attorneys for Plaintiffs.

The defendants to this bill are Ethan A. Hitchcock, William A. Jones, J. Geo. Wright and J. Blair Shoenfelt.

THE STATE OF TEXAS, }
County of Cooke. }

Edwin T. Morris, one of the plaintiffs, being first duly sworn, on oath deposes and says; that he has read the foregoing bill of complaint and knows the contents thereof, and that the facts therein stated upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

EDWIN T. MORRIS.

Sworn to and subscribed before me this the 16th day of August, 1902.

S. W. GLADNEY,
[SEAL.] *Notary Public for Cooke County, Texas.*

7 EXHIBIT "A."

Filed August 19, 1902.

Regulations (June 3, 1902) Governing the Introduction by Non-citizens of Live Stock in the Chickasaw Nation, Indian Territory.

8 Regulations (June 3, 1902) governing the introduction by non-citizens of live stock in the Chickasaw nation, Indian Territory.

9 Section 29 of the act of Congress, approved June 28, 1898, (30 Stat., 495,) ratifying the agreement with the Choctaw and Chickasaw nations, Indian Territory, provides in part as follows:

"It is further agreed that no act, ordinance or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or of the individuals, after allotment, or the moneys or other property of the tribe or citizens thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes), or the rights of any persons to employ any kind of labor; or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions passed by the councils of either of said tribes shall be approved by the governor thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same — said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a *bona fide* circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

"It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for a period of eight years from the fou-th day of March, eighteen hundred and ninety-eight."

Under these provisions, the following act of the Chickasaw national council, approved by the governor on May 3, 1902, was approved by the President of the United States on May 15, 1902 and entitled:

An act to prescribe privilege or permit taxes and defining the manner of their collection.

Be it enacted by the legislature of the Chickasaw nation:

SECTION 1. That there shall be paid upon live stock owned or held by non-citizens within the limits of the Chickasaw nation, an annual privilege or permit tax as follows: On cattle, horses and mules, twenty-five cents per head; and on sheep and goats, five cents per head: Provided, that there shall be exempted from the provisions of this act, when owned and used by the head of a family, two cows and calves, and one team, consisting of two horses or two mules, or one horse and one mule; and the provisions of this act shall also apply to all live stock introduced into the Chickasaw nation since January 1, 1902, upon which the tribal taxes imposed by the laws of the Chickasaw nation have not been paid, with like force and effect as if such cattle had been owned and held within the limits of Chickasaw nation for one year prior to the passage and approval of this act.

SEC. 2. That such privilege or permit taxes shall hereafter be payable to such person or persons, and collected under such rules and regulations as may be prescribed by the Secretary of the Interior.

SEC. 3. That the expenses of collecting such privilege or permit taxes shall be deducted from the gross collections, and the balance paid quarterly into the treasury of the Chickasaw nation.

SEC. 4. That such privilege or permit taxes shall be due and payable annually, upon demand, and if such taxes are not paid when demanded, the live stock upon which such taxes are due, shall be held to be in the Chickasaw nation without its consent, and unlawfully upon the lands of the Chickasaws, and the presence of such live stock, and owners or holders thereof, within the limits of said nation, shall be deemed detrimental to the peace and welfare of the Chickasaw Indians.

SEC. 5. That all acts or parts of acts in conflict herewith, be and the same are, hereby repealed; and this act shall take effect from and after its approval by the President of the United States.

In pursuance of the above and foregoing, the following regulations are promulgated:

10 *Regulations Prescribed by the Secretary of the Interior Governing the Introduction or Holding of Live Stock in the Chickasaw Nation by Non-citizens.*

SECTION 1. Any person, other than a recognized citizen of the Choctaw or Chickasaw nations, desiring to introduce or hold stock of any description within the limits of the Chickasaw nation, Indian Territory, shall first make application to the United States Indian inspector for the Indian Territory, Muscogee, Indian Territory, and shall pay to the U. S. Indian agent, Union agency, an annual tax of twenty-five (25) cents per head on all cattle, horses and mules, and on all sheep and goats five (5) cents per head, provided that there

shall be exempted from the provisions of these regulations, when owned and used by the head of a family, two cows and calves, and one team of horses, or two mules, or one horse and one mule.

SEC. 2. Such tax shall be paid January 1st of each year, or prior to the time of the introduction of such stock, and accompanying such remittance there shall be furnished, under oath, a full description of such stock, including the number and brands, together with any other desired information.

SEC. 3. Such taxes shall apply to all stock introduced within the limits of the Chickasaw nation since January 1, 1902, upon which taxes have not already been paid to the Chickasaw nation and for which the owners or holders cannot produce receipts.

SEC. 4. The tax prescribed shall be paid annually in advance, whether such stock is held the entire succeeding twelve months or for a portion of such time.

SEC. 5. Where cattle are held by a citizen and mortgaged to a non-citizen, not in good faith but for the purpose of evading the payment of taxes, said cattle shall be considered as owned or held by such non-citizen, and subject to these regulations and taxes.

SEC. 6. Parties who now hold stock within the limits of the Chickasaw nation, should remit the taxes prescribed promptly to the U. S. Indian agent at Muscogee, Indian Territory, and such payments must be made within ten (10) days from the date of receiving notice of these regulations. If such taxes are not paid within this time remittances made thereafter will not be accepted, but such stock and any other stock found within the limits of the Chickasaw nation after July 1, 1902, upon which taxes have not been paid, will be considered as being within the limits of the Chickasaw nation unlawfully, and measures will be adopted looking to the removal by the United States Indian agent of such stock, together with the owners or holders thereof, without further notice.

SEC. 7. Authorized agents of the Interior Department will make necessary investigations and reports and see that proper remittances are forwarded, acting under the direction of the United States Indian inspector for Indian Territory, but will not be authorized to receive or collect any taxes whatsoever, as all payments must be made direct to the United States Indian agent, who will furnish receipts for all payments made.

SEC. 8. These regulations and taxes will apply to all stock as indicated, held within the limits of the Chickasaw nation by other than recognized citizens of the Choctaw or Chickasaw nations, whether held upon the public domain or upon lands leased from individual Indians.

THOS. RYAN,
Acting Secretary.

Department of the Interior, Washington, D. C.

Approved June 3, 1902.

12 *Rule as to Injunction, &c.*

Filed August 19, 1902.

In the Supreme Court of the District of Columbia.

EDWIN T. MORRIS ET AL.
vs.
ETHAN A. HITCHCOCK ET AL. } No. 23477, Equity Docket 52.

Upon consideration of the bill of complaint, filed in the above-entitled cause, it is by the court this 19th day of August, A. D. 1902, ordered that the defendants and each of them show cause on or before the 19th day of September, A. D. 1902, why a temporary injunction should not be issued against them as prayed in said bill; provided a copy of this order be served upon said defendants within one week from this date.

And it is further ordered that leave is given to said defendants and each of them, to move for an earlier hearing upon this order, if they so desire.

HARRY M. CLABAUGH,
Associate Justice.

Marshal's Return.

Served copy of within order on Thomas Ryan, acting Secretary of the Interior, and the defendant Wm. A. Jones, personally, August 19, 1902.

AULICK PALMER, *Marshal.*

13 *Demurrer.*

Filed October 7, 1902.

In the Supreme Court of the District of Columbia.

EDWIN T. MORRIS ET AL.
vs.
ETHAN A. HITCHCOCK ET AL. } No. 23477, Equity Docket No. 52.

Come now the respondents and by protestation, not confessing or acknowledging all or any of the matters and things in the complainants' bill of complaint to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill of complaint upon and for the following grounds:

1. The court has no jurisdiction over the subject-matter of the suit.

2. There is a fatal defect of parties to the bill in that the Chick-

asaw nation or tribe, nor any member or representative thereof, is not made a party thereto.

3. The bill of complaint is bad in substance, and does not state facts sufficient to entitle the complainants, or either of them, to the relief prayed for, or to any relief.

WILLIS VANDEVANTER,
Assistant Attorney General, Solicitor for Respondents.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in law.

WILLIS VANDEVANTER,
Assistant Attorney General, Solicitor for Respondents.

14 Ethan A. Hitchcock, who as Secretary of the Interior, is one of the respondents in the above-entitled suit, being sworn, on oath says that the foregoing demurrer is not interposed for delay.

E. A. HITCHCOCK.

Subscribed in my presence and sworn to before me this 7th day of October, A. D. 1902.

[SEAL.] W. BERTRAND ACKER,
Notary Public in and for D. C.

Opinion of Justice Hagner.

Filed January 8, 1903.

In the Supreme Supreme Court of the District of Columbia.

EDWIN T. MORRIS ET AL., Complainants,
vs.
ETHAN A. HITCHCOCK ET AL., Defendants. } No. 23477. In Eq.

WASHINGTON, D. C., *December 16th*, 1902.

After this case was argued and submitted, I deferred my decision because the case of The Cherokee Nation *versus* Hitchcock had been argued in the Supreme Court, and I felt quite sure no decision could be arrived at there which would not, to some extent, involve some of the questions presented here.

Recently that case has been decided, and I have before me
15 the opinion of Justice White, to which I shall refer as I proceed, so far as the points there settled were in common with those involved in this case.

It is needless to recapitulate the facts for I am not speaking to strangers to the litigation.

Two objections to the form of the complainants' proceedings have been relied on by the defendants, which should be first considered.

1st. It is insisted the bill presents no case for equitable relief, and

if any ground for relief exists at all, it should be sought in a court of law.

The Supreme Court in its opinion in the Cherokee case remarks upon the omission by this court and by the Court of Appeals to pass upon a similar objection made in that case which seems to render it proper to notice the point in the present instance.

In my opinion the bill does present a case authorizing the application to an equity court, as well upon the main contentions presented, as upon the ground that the resort to a court of law by the complainants would result in a great multiplicity of suits to be brought by the individual owners of the hundred thousand animals claimed to be affected by the act of the Chickasaw council and the regulations of the Secretary of the Interior. For as suits might be brought, not only contesting the legality of the privilege or permit tax itself, but also with respect to the multiform grievances that would grow out of the seizure of the cattle, the litigation would be infinite, and it would be impossible that the injured parties could enjoy that adequate and complete remedy at law, which must be shown to exist before the interposition of an equity court should be refused.

16 In disposing of the similar contention urged in the Cherokee case, involving the same consideration, after an examination of the objection, Justice White says:

"Without going into detail, we think the statements in the bill were sufficient to show that the jurisdiction of a court of equity was properly invoked."

2nd. The second objection was that the Chickasaw nation should have been made a party defendant to the bill. I think this contention is equally untenable. The nation is no more a necessary or indispensable party because the validity of the acts of its council is assailed, than the United States could be considered a necessary party to the numerous suits of this description, which have been sustained by the courts, where the constitutionality of acts of Congress was assailed. If this court should decree that the regulations and act are valid, the rights of the Chickasaw nation would be as fully sustained as if it had been made a party. On the other hand, if the court should adopt the contention of the complainants and enjoin the Secretary and the Commissioner from further proceedings to enforce these regulations, that decree would tie the hands of the nation as effectively as if it were an actual party. In neither case could the nation present any defense that has not been submitted to the court in its behalf by the present parties.

The suggestion of the Attorney General, that section 2 of the Curtis bill (30 Stats., 495) authorizes the nation to be brought into court in certain cases, is far from proving that it can be held to be a necessary or an indispensable party in this suit. That section applies only to suits in which it shall appear to the court that

17 the *property* of any tribe is involved, as is expressed in plain terms in the section, as follows:

"Then when in the progress of any civil suit, either in law or

equity, pending in the United States court in any district in said Territory, *it shall appear to the court that the property of any tribe is in any way affected* by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief governor of the tribe and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

It is true this provision was invoked in the case of Buffington *vs.* Henry L. Dawes—one of the manuscript cases which has been produced since the argument; but the privilege or permit tax, under consideration here can no more be correctly styled *the property* of the nation, in the proper sense of the term, than the permission to issue licenses in this city for vehicles or animals can be called "the property" of the District of Columbia. Besides, the section does not require the presence of the nation as an original party even in actions respecting its property, but its appearance in the course of suits must be directed by the court, upon application, as was done in the case of Buffington *vs.* Dawes. This point was also made in the case of Maese *vs.* Hermann, 183 U. S. 578.

That case, which originated in this court, was brought by a number of persons claiming to sue in behalf of the citizens residing on a great tract of land, known by the name of Las Vegas on the
18 Mexican frontier, and objection was made that the town of Las Vegas was not made a party. This objection was considered and overruled by this court, and the case finally went to the Supreme Court of the United States.

In the opinion, on page 577, the court notices that "the courts below took different views of this objection—the supreme court holding that the town of Las Vegas was not, and the court of appeals holding that the town was, a necessary party."

But, as the Supreme Court did not sustain the contention of the defendants and took no further notice of it, it seems, clear, from their ultimate action, they considered the town of Las Vegas was not a necessary party.

The court in the Cherokee case, uses this language with reference to this objection:

"The second objection is that the Cherokee Oil & Gas Company named in the bill is a necessary party to the suit, as shown by the bill. * * *

"So far as the second ground of objection is concerned, we presume that the courts below omitted to pass expressly thereon, because it was deemed that the company named was properly omitted from the bill. As the bill assailed generally the want of power in the Secretary of the Interior to execute leases affecting lands owned by the tribe, and referred to in the application pending for a lease made by the Cherokee Oil and Gas Company as manifesting but a particular instance in which it was charged that the Secretary
19 of the Interior might exercise the power conferred by the statute, the corporation named was not an indispensable party to the bill. Clearly, every person with whom the Secretary might

contract, if he exercised the discretion vested in him by the statute, were not indispensable parties to the determination of the question whether the statute had lawfully conferred such discretionary power upon the official in question."

I entertain no doubt that the demurrer on this ground should *should* not be sustained.

3rd. It is proper also at this point to notice the contention of the complainant as to the effect of the demurrer, as an admission of important contentions in the bill, respecting the proper construction of various laws of Congress, and other public acts relating to the great property there in controversy, which laws and public acts were vouched into the case by the complainants as parts of their bill. In the Las Vegas case, the United States had interposed a demurrer, and the complainants insisted that the Government authorities were bound by its demurrer as an admission of the correctness of the construction so contended for by the complainants. To this the court below replied:

"The rule that a demurrer operates as an admission of facts properly pleaded in a bill, applies only to such matters as are material, relevant, and which are set forth with legal certainty. It is also settled that if any repugnancy appears between averments in the bill respecting the contents of the paper and the statements in the
20 instrument itself appearing in the record, the latter will prevail, and the demurrer cannot be held to admit the truth of the averments in the bill (99 U. S. 45, U. S. *vs.* Ames), and further, that arguments and inferences from alleged facts are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegations."

"All the acts of Congress relied upon by either side of this controversy, are public statutes, of the contents of which the court must take judicial notice, as it will of the statements contained in, and accompanying the official reports referred to in the bill and which form indispensable parts of the history of the case. The complainants must be considered as having vouched into this cause by their bill, not only all the statements, but also all official reports and documents emanating from Government officials."

And the court held that the determination of the effect of those statutes and public acts were matters for construction by the court,—which could not be bound by what it found to be a faulty construction placed upon them by the complainants, simply because of the supposed admissions of the demurrer.

4th. We approach now to the governing points in the case, which, as presented by the complainants, are substantially these:

1st. That the council of the Chickasaw nation was without authority to enact the law "prescribing the privilege or per-
21 mit taxes and defining the manner of their collection."

2nd. That assuming the council had power and authority to enact a proper law on the subject, the act in question is invalid because of its uncertainty and manifest irregularities.

3rd. That the regulations promulgated by the Secretary of the

Interior, prescribing the rights of persons introducing or holding stock within the limits of the nation—whether made in execution of that act or independently of that act—are without lawful authority, and are void; and

4th. That the claims of the Secretary of the power to promulgate the regulations in virtue of statutes antecedent to the Curtis law and the Indian statutes, and by force of the old trade and intercourse laws is equally unfounded in law.

These positions have heen ably discussed by counsel on both sides, and it is needless to repeat their arguments at length or to examine particularly the authorities their industry had adduced; but a careful examination of the citations on both sides has satisfied me that neither of the positions presented by the complainants can be maintained.

The court of appeals of the Indian Territory in January, 1900, rendered a decision in the case of Maxey *vs.* Wright (54 Southwestern Reports, 805), which altogether sustain- the conclusions I have adopted. The act of the Creek council involved in that case imposed a tax of $25.00 on non-resident attorneys, practicing in the nation, and upon any resident attorney practicing there who
22 was not a citizen of the Creek or Seminole nations. The court held the law was valid, and that upon refusal to pay the attorney might properly be declared to be an intruder and removed from the Indian Territory by the Government authorities. There have been no decisions referred to overruling that opinion; or which, I think, are really at any variance with it.

One of the manuscript cases produced by the Attorney General, which recognized its correctness, is Kloski *vs.* Ellis, decided in December, 1901, a year afterwards, by the United States court for the southern district of the Indian Territory. That case involved the power and right of the Government officials, under orders by the Commissioner of Indian Affairs approved by the Secretary of the Interior, to remove from the nation the complainants who were merchants living at the town of Ardmore as persons whose presence was detrimental to the peace and welfare of the Indian nation, under the provision of the Revised Statutes of the United States. The court there cited with approval the case of Maxey *vs.* Wright, declaring:

"But, as I view this question it has been settled by the court of appeals of the Indian Territory, and said decision affirmed by the court of appeals of the eighth district, in the case of Maxey *vs.* Wright, 54th S. W. 807, against the contention of the plaintiffs."

The court proceeded in its able opinion to review the facts in Maxey *vs.* Wright, and adds:

"That is conclusive on this court. The only remedy left the complainants in my opinion is an appeal to Congress."

23 In opposition to this, complainants' counsel has referred the court to a manuscript decision delivered in September, 1902, by Judge Gill, of the United States circuit court for the northern district of the Indian Territory, in the case of Buster and Jones *vs.*

Wright, granting an injunction to restrain certain officials, who were threatening the plaintiffs to close their places of business by a designated hour, unless they should pay a tax required by an act of an Indian council; and also to expel the offenders from the nation. But the court in its opinion also took occasion to approve the decision in Maxey *vs.* Wright as to the general power of the Interior Department of the United States Government to remove from the Indian Territory white men, who refused to pay the license required by the laws of the Indian nation to entitle them to engage in business there. But discriminating the case then before it from Maxey *vs.* Wright, the court based its action upon the point that the particular course threatened in the case then before it had not been recognized by any statute of the United States. Whereas in the other cases there had existed some legislation, which, by its reasonable interpretation, justified the action of the authorities. The court says:

"Conceding, then, that the Secretary of the Interior had the power to collect, there is no statute empowering him or his officers and agents to resort to this summary proceeding. Especially is this true where the property seized is not to be sold and the surplus turned back to the owner, but the whole contents of the store building is to be locked up and held, and all business suspended until the delinquent shall be coerced into payment."

24 "We are, therefore, of the opinion that in this particular the complainant stated a good ground for an injunction, and that the court erred in sustaining the demurrer to it.

"Since the entry of the decree in the court below, Congress, by act approved May 27th, 1902, has provided: "That it shall hereafter be unlawful to remove or deport any person from the Indian Territory who is in lawful possession of any lots or parcels of land in any town or city in the Indian Territory which has been designated as a townsite under existing laws or treaties."

By repeated decisions the Supreme Court of the United States, in one form or another, has practically denied the correctness of either of the propositions now advanced by the complainant-. In the recent opinion in the Cherokee case, that court points out that the policy of the Government has been greatly changed on this subject by the passage of the act of March 3, 1871, which abandoned the previous customary method of dealing with the Indians by treaties, and expressed its intention thereafter to make the Indian tribes amenable directly to the power and authority of the United States by the exercise of its legislative power over them; the opinion on this point concludes as follows:

"The power existing in Congress to administer upon and guard the tribal property, and this power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and not one for the courts."

25 The inquiry made by this court in the argument, whether the act of the council might not be held objectionable because

of its discrimination in imposing a tax solely upon non-residents, I am now satisfied should be answered in the negative. It is settled there is nothing inherently unjust in a State or other community possessing the power of self-government to exact from non-residents alone charges for the use of its common property as a mode of regulation for that use. Although the constitutional inhibition in section 2, article IV, is in terms declared to be applicable to the States, yet the oyster laws requiring licenses to be taken out by non-residents alone to authorize dredging by them in the waters of Maryland have been held to be not inconsistent with the constitutional provision of section 2, article IV.

Upon the whole case, I have, therefore, no alternative but to sustain the demurrer and, as no leave to amend is asked by the complainants, I shall pass an order to dismiss the bill.

A. B. HAGNER,
Associate Justice.

Decree, &c.

Filed December 19, 1902.

In the Supreme Court of the District of Columbia.

EDWIN T. MORRIS ET AL., Complainants,
vs.
ETHAN A. HITCHCOCK ET AL., Respondents.
} No. 23477, Doc. 52. In Equity.

26 Come now the parties to this cause, by their respective solicitors, and the cause having been heretofore submitted to the court upon the demurrer of the respondents to the complainants' bill of complaint, and the same having been argued by counsel, and the court being fully advised in the premises, does now consider, order and decree that the said demurrer be, and the same is hereby sustained; and the complainants electing to stand upon their said bill of complaint it is by the court considered, ordered and decreed that the bill of the complainants be, and the same is hereby, dismissed; that the respondents go hence without day, and that they recover from the complainants their costs, to be taxed by the clerk. Whereupon the complainants take an appeal to the Court of Appeals of the District of Columbia and ask that the same be noted in this decree, which is accordingly done; and the amount of the bond to be given by the appellants to cover costs is hereby fixed at one hundred dollars, in lieu of giving which the complainants, at their option, may deposit in the clerk's office the sum of one hundred dollars to cover costs.

Dated December 19, 1902.

A. B. HAGNER,
Asso. Justice.

Memorandum.

December 29, 1902.—$100 deposited by complainants in lieu of appeal bond.

27 *Order for Transcript.*

Filed December 29, 1902.

In the Supreme Court of the District of Columbia.

EDWIN T. MORRIS ET AL.
vs.
ETHAN A. HITCHCOCK ET AL. } # 23477, Equity Docket 52.

The clerk of the court:

The record on appeal in this case is to contain the following papers:

The bill & exhibits filed August 19, '02.
" rule to show cause " " " "
" appearance of the def'ts " 30, "
" demurrer to bill filed October 7, 1902.
" opinion of the court.
" decree filed, December 19, 1902.

RALSTON & SIDDONS,
Comp'ts' Sol'rs.

28 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 23, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 23,477, in equity, wherein Edwin T. Morris *et al.* are complainants, and Ethan A. Hitchcock *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 15 day of January, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1273. Edwin T. Morris *et al.*, appellants, *vs.* Ethan A. Hitchcock *et al.* Court of Appeals, District of Columbia. Filed Jan. 17, 1903. Robert Willett, clerk.

In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1903.

EDWIN T. MORRIS ET AL.
v.
ETHAN A. HITCHCOCK ET AL. } No. 1273.

BRIEF OF APPELLEES.

WILLIS VAN DEVANTER,
Assistant Attorney-General,
A. C. CAMPBELL,
Assistant Attorney,
Solicitors for Appellees.

In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1903.

EDWIN T. MORRIS, EDLAR B. BLANTON, William G. Maxwell, Phillip S. Witherspoon, Isaac H. Harness, Thomas Peery, R. L. Glover, J B. Spragins, C. M. Keyes, and Milton F. Ikard, appellants,

v.

ETHAN A. HITCHCOCK, WILLIAM A. JONES, J. George Wright, and J. Blair Shoenfelt, appellees.

No. 1273.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

STATEMENT.

August 19, 1902, Edwin T. Morris, Edlar B. Blanton, William G. Maxwell, Philip S. Witherspoon, Isaac H. Harness, Thomas Peery, R. L. Glover, J. B. Spragins, C. M. Keyes, and Milton F. Ikard, appellants, filed in the supreme court of the District of Columbia their bill of complaint against Ethan Allen Hitchcock, as

Secretary of the Interior, William A. Jones, as Commissioner of Indian Affairs, J. George Wright, as Indian inspector, and J. Blair Shoenfelt, as Indian agent at the city of Muscogee, Indian Territory, appellees, praying, in effect, that the latter be perpetually restrained and enjoined from seizing, molesting, or removing appellants' live stock from the Chickasaw Indian Nation, and further, that the act of the Chickasaw national council of May 3, 1902, entitled "An act to prescribe privilege or permit taxes, and defining the manner of their collection," together with the regulations of the Secretary of the Interior governing the introduction or holding of live stock in the Chickasaw Nation by noncitizens, approved June 3, 1902, be adjudged void. (Record, pp. 1–7.)

October 7, 1902, appellees filed a demurrer to the bill (Record, pp. 8, 9) assigning as grounds for the demurrer—

1. The court has no jurisdiction over the subject-matter of the suit.

2. There is a fatal defect of parties to the bill, in that the Chickasaw Nation, or tribe, nor any member or representative thereof, is not made a party thereto.

3. The bill of complaint is bad in substance, and does not state facts sufficient to entitle the complainants, or either of them, to the relief prayed for, or to any relief.

December 16, 1902, the court below, in a written opinion, sustained the demurrer. (Record, pp. 9–15).

December 19, 1902, the court below entered a decree dismissing the bill, noting therein that the appellants take an appeal to this court. (Record, p. 15.)

POINTS AND ARGUMENT.

A.

EFFECT OF THE DEMURRER.

The allegations in the bill, which amount to statements of the legal effect of the act of the Chickasaw National Council, or of the regulations of the Secretary of the Interior in question, or of the power and authority of the Indian Bureau in the premises, are not admitted by the demurrer. (Daniels, Ch. Pl. and Pr., vol. 1, p. 552, 5th ed.; *Maese* v. *Hermann*, 17 App., D. C., 52,59.)

The rule as to the effect of a demurrer and as to the matters which are admitted thereby to be true is clearly and concisely stated in *Maese* v. *Hermann* (*supra*), as follows:

> It is a well-settled principle in the law of demurrer that, while the demurrer admits as true, for the purposes of the decision invoked by it, all facts well and sufficiently pleaded, yet it does not admit as true mere matters of law which the pleader may think proper to state in his pleadings, nor the conclusions drawn from the facts stated therein. That is for the court exclusively. Nor does the demurrer in any manner admit the correctness of an allegation as to the construction of a statute, or of a grant, or other document, or official act that may be insisted upon by the pleader as the foundation of his claim and title, or that may be set up in opposition thereto. That is a matter of law for determination by the court. These propositions are too clear to require citations of authority for their support.

B.

QUESTIONS PRESENTED BY THE DEMURRER.

I.

If the matters complained of are unauthorized, as contended by appellants, they have a complete and adequate remedy at law by an action for damages against those who may, by order of the Secretary of the Interior, remove appellants' live stock from the nation; hence a court of equity should not interfere. (Beck v. Flournoy L. S. & R. E. Co., 27 U. S. App., 618, 630-631; s. c., 65 Fed. Rep., 37-38; affirmed, 163 U. S., 686; Cruickshank v. Bidwell, 176 U. S., 73-80.)

The case of *Beck* v. *Flournoy* was a case of similar import, both as to law and facts, as the case at bar, and in disposing of the case the circuit court of appeals, among other things, said:

> Under these circumstances, it is clear, we think, that a court of equity should not interfere, at the instance of the appellee, to arrest any action that the Government of the United States may take to vindicate its rights. It should leave the appellee in the condition in which it has deliberately placed itself, and require it to seek redress in a court of law for whatever damage it may sustain in consequence of any wrongful act committed by Government officers in ejecting it from the demised premises, if any such wrongful act is in fact committed.

In *Cruickshank* v. *Bidwell* it was held:

> The mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith,

but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction.

II.

The Chickasaw Nation has such an interest in the subject-matter of the controversy as makes it an indispensable party to the suit, and it having been omitted, the action can not be sustained.

The general rule in chancery is that all those whose presence is necessary to a determination of the entire controversy must be made parties.

Section 737 of the Revised Statutes and the equity rules do not have the effect of permitting the court to proceed in the absence of an indispensable party.

"It remains true," says the court in *Shields* v. *Barrow* (17 How., 130, 141), "notwithstanding the act of Congress and the forty-seventh rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it which so far involves or depends upon the rights of an absent person, that complete and final justice can not be done between the parties to the suit without affecting those rights."

While the above decision was rendered prior to the passage of the act of Congress which is now incorporated into the Revised Statutes as section 737, yet the ruling so made was, in the language used, approved in *Greeley* v. *Lowe* (150 U. S., 58, 70). See also *Chadbourne's Ex.* v. *Coe* (10 U. S. App., 78, 83; s. c., 51 Fed. Rep., 479).

The complainants are seeking to enforce a claimed right to graze or range their cattle over lands which are the property of the tribe (*Stephens* v. *Cherokee Nation*, 174 U. S., 445, 488) without payment of the permit fees which are exacted by the tribe under its tribal laws, and which constitute a source of revenue to the tribe and are its property.

That the Chickasaw Nation is an indispensable party is amply illustrated by authority. In *Swan Land and Cattle Co.* v. *Frank* (148 U. S., 603, 610) the complainant company, a British corporation, instituted suit in the United States circuit court for the northern district of Illinois against Frank and others, stockholders of certain Wyoming corporations, alleging, among other things, that complainant company had purchased all the assets and properties of the Wyoming corporations; that the vendors had fraudulently misrepresented the amount and value of the property; that the defendants, as stockholders, had received their proportionate shares of the proceeds of the sale; that since the sale the vendor companies had ceased to exercise their franchises, and prayed that each of the defendants be required to account for and pay to complainant so much of the assets of said respective companies as may be necessary to satisfy its demand. The vendor corporations were not made parties to the bill, and only such stockholders were made parties as were within the district. The bill was demurred to, one of the grounds being "that the vendor corporations are necessary and indispensable parties to the

suit." The demurrer was sustained. Upon this question the circuit court said (39 Fed. Rep., 456, 461):

> The complainants are, in effect, by this bill seeking to compel these defendant stockholders to try a case in this court against corporations who are not parties to the suit. The first and fundamental question in the complainant's case is, Has there been a breach of the covenants of these vendor corporations, and what amount of damage has the complainant sustained by reason of such breach? It would be anomalous and unjust, it seems to me, to try this question in a suit to which the corporations were not parties and where they could not be heard.
>
> * * * * *
>
> These vendor corporations, being Wyoming corporations, can not be brought into this court, and hence the bill is not only fatally defective as it stands, but can not be amended in that respect. The demurrer is therefore sustained and the bill dismissed.

The Supreme Court, in affirming that decision (148 U. S., 610, 611), among other things, said:

> Now, it is too clear to admit of discussion that the various corporations charged with the fraud which has resulted in damage to the complainant are necessary and indispensable parties to any suit to establish the alleged fraud and to determine the damages arising therefrom. Unless made parties to the proceeding in which these matters are to be passed upon and adjudicated, neither they nor their other stockholders would be concluded by the decree. The defendants can not be required to litigate those ques-

> tions which primarily and directly involve issues with third parties not before the court.
>
> * * * * *
>
> The general rule that suits in equity can not be entertained and decrees be rendered when necessary or indispensable parties, whether corporations or individuals, are not brought before the court, is not affected by section 1 of the act of February 28, 1839, c. 36, reenacted in section 737 of the Revised Statutes of the United States, as this court has repeatedly held. (*Shields* v. *Barrow*, 17 How., 130, 141; *Coiron et al.* v. *Millaudon*, 19 How., 113, 115; *Ogilvie* v. *Knox Ins. Co.*, 22 How., 380; *Barney* v. *Baltimore*, 6 Wall., 280; *Davenport* v. *Dows*, 18 Wall., 626.)

In *New Orleans Water Works Co.* v. *New Orleans* (164 U. S., 471, 480) complainant company, under an act of the legislature of Louisiana passed in 1877, secured the exclusive privilege, for the period of fifty years, of supplying the city of New Orleans and its inhabitants with water, but later the city council assumed to make and promulgate ordinances conferring upon individuals and corporations the right to lay pipes, etc., through the streets and public ways of the city for the purpose of conducting water to certain premises and inhabitants. The New Orleans company brought a suit against the city, asking, among other things, that these ordinances of the city granting to persons and corporations the right to lay pipes, etc., in the streets, be declared null and void, and that the city be restrained from passing ordinances of like character. Among other things the court (p. 480) said:

None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless, the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal, and cancel each ordinance that does not relate to premises contiguous to the Mississippi River; and if the city does not, within such time and in some public way, cancel and annul those ordinances, then that the court in this suit shall adjudge and decree them to be null and void, as illegally interfering with the rights of the plaintiff.

We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances, for in the absence of the parties interested and without their having an opportunity to be heard the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity. (*Windsor* v. *McVeigh*, 93 U. S., 274, 277; *Pennoyer* v. *Neff*, 95 U. S., 714, 733; *Scott* v. *McNeal*, 154 U. S., 34, 46.)

The latest expression of the Supreme Court upon this question is found in *Minnesota* v. *Northern Securi-*

ties Co. (184 U. S., 199, 235–8). It is therein held (syllabus) that—

> When it appears to a court of equity that a case, otherwise presenting ground for its action, can not be dealt with because of the absence of essential parties; and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in this case, when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend.

Litchfield v. *Register and Receiver* (9 Wall., 575, 578) is especially applicable here, and the following authorities also sustain our contention: *Sioux City Terminal R. & W. Co.* v. *Trust Co. of N. A.* (49 U. S. App., 523, 530—s. c. 82 Fed., 124, 126); *Northern Ind. Rd. Co.* v. *Michigan Cent. R. Co.* (15 How., 233, 244, 245); *State of Kansas* v. *Anderson* (5 Kans., 90, 114); *McCarthy* v. *Walsh* (41 *Id.*, 17, 19); *Union Terminal Co.* v. *Board of Railroad Commissioners* (52 *Id.*, 680—s. c. 35. Pac. Rep., 224–5); *Beasley* v. *Shively* (20 Ore., 508–10—s. c. 26 Pac. Rep., 846); *Gregory* v. *Stetson* (133 U. S., 579, 586); *Donovan* v. *Campion* (85 Fed., 71–2—s. c. 56 U. S. App., 388, 390); *California* v. *S. P. R. Co.* (157 U. S., 229, 251); *Maese* v. *Hermann* (17 App. Cases, 52, 60–6).

Within the principle of the above decisions the court can not proceed in the absence of the Chickasaw Nation.

The holding of the court below, to the effect that

the Chickasaw Nation was not an indispensable party to the action, was based on the decision of the Supreme Court of the United States in the case of *Cherokee Nation et al.* v. *Ethan A. Hitchcock*, Secretary of the Interior, decided December 1, 1902 (187 U. S., ——). In that case, as an examination will disclose, the Cherokee Indian Nation was a party to the action, it being the complainant. The demurrer raised the question that the Cherokee Oil and Gas Company, with whom it was alleged the defendant, Secretary of the Interior, was about to consummate a lease affecting the complainant's lands, was an indispensable party to the action. In disposing of this point the Supreme Court, among other things, said:

> Clearly, every person with whom the Secretary might contract, if he exercised the discretion vested in him by the statute, were not indispensable parties to the determination of the question whether the statute had lawfully conferred such discretionary power upon the official in question.

In this case, however, the Chickasaw Nation, as was the Cherokee Nation in that case, is vitally interested in the question to be determined, for the reason that the tribal tax, the collection of which is sought to be here enjoined, amounts to many thousands of dollars, as appears upon the face of the bill, and supplies the principal revenue upon which the nation relies for the support of its local government, as will appear by reference to public records and public documents of which the court takes judicial notice.

III.

The acts complained of can not be enjoined for the reason that in their performance they involve the exercise of judgment and discretion by an executive officer in the discharge of duties imposed upon him by law in a mere matter of administration.

This is shown by sections 441, 463, 2058, 2147, 2149, Revised Statutes; *Brown* v. *Hitchcock* (173 U. S, 473, 477); *Gaines* v. *Thompson* (7 Wall., 347, 353); *The Secretary* v. *McGarraghan* (9 *id.*, 298, 312); *Litchfield* v. *Register, etc.* (*id.*, 575, 577–578); *New Orleans* v. *Paine* (147 U. S., 261, 264); *Cruickshank* v. *Bidwell* (176 *id.*, 73, 80); *Wilbourne* v. *Baldwin* (47 Pac. Rep., 1045); *Cherokee Nation et al.* v. *Hitchcock* (187 U. S. ——); *U. S. ex rel. Riverside Oil Co.* v. *Hitchcock*, decided in this court February 3, 1903.

In *Brown* v. *Hitchcock* (*supra*, p. 477), it is stated:

> As a general rule, no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.

This decision further declares that such litigation should generally proceed "in the locality where the property is situate, and not here, where the administrative functions of the Government are carried on."

In *Noble* v. *Union River Logging Railroad Company* (147 U. S., 165) proceedings by injunction were sustained against the Secretary of the Interior; but in *Cruickshank* v. *Bidwell* (*supra*, p. 80), the court, in commenting on that case, said:

> In *Noble* v. *Union River Logging Railroad Company* (147 U. S., 165) the jurisdiction was sustained, but the Government raised no point as to the form of the remedy, and deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was there threatened. And it appears that the only remedy was through equity interposition. (*New Orleans* v. *Paine*, 147 U. S., 261, 264.) But we are unwilling to extend that precedent.

IV.

The bill upon its face shows that appellees are public officers, and as such, in the matters sought to be enjoined, have acted and intend to act only within the scope of their authority, legally conferred upon them; hence injunction will not lie to restrain them in the exercise of that authority. (High on Injunctions, 3d ed., vol. 2, sec. 1309.)

C.

APPELLANTS' CONTENTIONS.

In support of their bill appellants contended in the court below, and to sustain their assignments of error in this court they now contend, in effect, as follows:

1. That the act of the Chickasaw national council in question is, in effect, a law which provides for the imposition of a tax upon property brought and kept

within said nation by and belonging to citizens of the United States, not members of the tribe; that it discriminates against nonresident citizens, and that said council never had, under treaty stipulations with the United States nor under any law of Congress, the power to enact any such law.

2. That conceding that such power could be and was conferred by the United States under its treaty stipulations with said tribe and under acts of Congress, subsequent legislation, and especially the act known as the "Curtis bill" (June 28, 1898, 30 Stat., 495), and the act of March 3, 1901 (31 Stat., 1447), amending section 6 of the general allotment act of February 8, 1887 (24 Stat., 388-390), sometimes, but not frequently, called the "Dawes Act," which amendment declares every Indian in the Indian Territory to be a citizen of the United States and entitled to all the privileges and immunities of such citizen, in effect abrogated such power and repealed the treaty stipulations and acts of Congress conferring the same; that since the passage of the acts aforesaid any citizen of the United States has the right to reside upon and take and keep his property within the Chickasaw Nation without and against its consent. Further, that the effect of said acts is to deprive the President of the United States, the Secretary of the Interior, and Commissioner of Indian Affairs, and all executive officers of the supervision and control over the Chickasaw Indians and their affairs which had theretofore existed.

3. That the herds of live stock of the plaintiffs are

rightfully within said nation by reason of permission given to appellants through contracts entered into between them and individual members of the Chickasaw Nation.

4. That conceding the Chickasaw Nation, under treaty stipulations and other acts of Congress, possessed and still possesses the power and authority, irrespective of the "Curtis bill" and the act of March 3, 1901, *supra*, to enact a permit law discriminating against nonmembers of said tribe, citizens of the United States, and exacting a permit from such citizens for the privilege given them of pasturing their live stock within the nation, nevertheless the act in question and the rules and regulations complained of are invalid; the former for the reason that it fixes no time or place and provides no method for the collection of, nor affixes any penalty for failure to pay, said tax; and the latter for the reason that Congress has not and could not confer upon the Secretary of the Interior the power to prescribe and promulgate any rules and regulations for the collection of a tribal tax; nor for the removal of live stock from the nation in question, where the owners of such live stock refuse to pay such tribal tax; and that the rules and regulations complained of are invalid for the further reason that they violate the fifth amendment of the Federal Constitution, which requires that no person shall be deprived of property without due process of law.

D.

POSITION OF THE APPELLEES.

It is conceded that the act of the Chickasaw Nation in question imposes a license or permit fee upon live stock brought or kept within the nation, belonging to citizens of the United States, not members of the tribe; that no such license or permit fee is imposed upon live stock brought or kept within the nation belonging to members thereof.

It is not conceded that the Chickasaw Nation is without power to pass the act in question, or that the Secretary of the Interior is without authority to make the rules and regulations complained of, or that the executive officers of the Government are without authority to remove appellants' live stock from the Chickasaw Nation in the event of the failure of the owners thereof to pay the tribal tax in question.

It is believed and insisted by the appellees that as officers of the Indian Bureau they have full power and authority to remove or cause to be removed from the Chickasaw Nation the live stock belonging to appellants, and that this power is political in its nature, hence can not be controlled or interfered with by the courts. This contention is based upon the following propositions:

1. Under existing law the Secretary of the Interior is charged with the supervision of the public business relating to the Indians; by his direction the Commissioner of Indian Affairs has the management of all Indians and their affairs and of all matters arising out

of Indian relations; and each Indian agent within his agency executes and performs such duties as may be prescribed by his superior officers.

2. By treaty stipulations ratified and laws of Congress enacted prior to the passage of the so-called "Curtis bill," and prior to the passage of the act of March 3, 1901, *supra*, the Government solemnly obligated itself to remove all "*intruders*" from the Chickasaw Nation. The enforcement of this obligation is by law made the duty of the Indian Bureau, and neither the obligation nor the duty of enforcing the same is in any way affected by the passage of the acts last mentioned.

3. The question of who are "*intruders*" is to be determined by the Secretary of the Interior, and when determined by him it can not be reviewed by the judiciary in injunction or mandamus proceedings, for the reason that the determination of the question by the Secretary of the Interior involves upon his part the examination of facts and the construction of laws.

4. The Chickasaw Nation is a distinct political society, possessing, by reason of Congressional delegation, power and authority to regulate its own domestic affairs and to enact its own laws, though such laws may not be in conflict with the Constitution of the United States nor in conflict with the laws of Congress.

5. The act of the Chickasaw National council in question is a valid exercise of the power conferred by Congressional delegation, in that it provides for the raising of revenue for the support of its local government and prescribes the conditions upon which persons

not members of the tribe, and their property, may come into and remain within the Indian Nation, and what persons and property are deemed detrimental to its peace and welfare. Said act neither conflicts with the Constitution of the United States nor with any act of Congress; but even did it so conflict, appellants are estopped from denying its validity, for the reason that they have accepted benefits conferred by it.

6. The Secretary of the Interior is vested by Congress with full power and authority to prescribe appropriate rules and regulations for the enforcement of the act of the Chicasaw Nation in question, and it is his duty to do so.

7. The making and the promulgating of the rules in question were an appropriate exercise of the power conferred upon the Secretary of the Interior, and said rules are not in conflict with any provision of the Constitution of the United States or with any law of Congress, nor will the enforcement thereof violate any rights of the appellants.

8. Plaintiffs acquired no right to pasture their live stock within the boundaries of the nation by reason of any permission given by, or by reason of any contract or contracts made with, individual members of the nation.

FIRST PROPOSITION.

Sections 441, 463, 465, and 2058 of the Revised Statutes are referred to in support of the first proposition.

These sections have too often been the subject of judicial interpretation to now admit of a successful challenge of their constitutionality.

SECOND PROPOSITION.

By treaty stipulations ratified and laws of Congress enacted prior to the passage of the so-called "Curtis bill" and prior to the passage of the act of March 3, 1901, supra, the Government solemnly obligated itself to remove all "intruders" from the Chickasaw Nation. The enforcement of this obligation is by law made the duty of the Indian Bureau, and neither the obligation nor the duty of enforcing the same is in any way affected by the passage of the acts last mentioned.

The Chickasaw Indian tribe is one of the tribes or nations which were removed from the east to the west of the Mississippi upon an exchange of territory under the authority of the act of May 28, 1830 (4 Stat., 412). (*See* sec. 2114, R. S.) Under this statute the President was authorized to exercise general superintendence and care over the Chickasaw tribe and to cause it to be protected at their new residence from any person or persons whatever.

Prior to October 20, 1832, the Government dealt with the Chickasaw Nation by negotiations with the Choctaw Nation, the two nations at the time living together and not having separate councils. By the treaty of September 27, 1830 (7 Stat., 333), between the Government and the Choctaw Nation it was provided by articles 9 and 11 thereof (pp. 334 and 335) that the United States would secure the nation against intrusion and would remove intruders therefrom.

On October 20, 1832 (7 Stat., 381), the United States made a treaty direct with the Chickasaws, in the preamble of which it is recited, among other things, that

the latter "prefer to seek a home in the West, *where they may live and be governed by their own laws.*"

January 17, 1837 (7 Stat., 605; 11 Stat., 573), "Articles of convention and agreement" were entered into between the Choctaw tribe and the Chickasaw tribe, which agreement was, on February 25, 1837, approved by the President. By article 1 of this agreement it is provided that "the Chickasaw people shall be entitled to all the rights and privileges of Choctaws" with respect to its local government.

June 22, 1855 (11 Stat., 611), another treaty was entered into between the United States and the Choctaw and Chickasaw tribes. This treaty superseded and took the place of all former treaties between the United States and the two nations. Article 1 defined the boundaries of the Choctaw and Chickasaw Nations; article 2 established within these boundaries a district for the Chickasaws. By article 7 the Government obligated itself to remove from the Chickasaw Nation all persons found therein considered as intruders, while article 14 protected the Chickasaws from aggressions by other Indians and white persons not subject to their jurisdiction and laws.

On April 28, 1866, for the reason that the Choctaws and Chickasaws had cooperated with the Confederate forces during the civil war by making war upon other Indians adhering to the United States (see *United States* v. *Choctaw and Chickasaw Nations*, 179 U. S., 494, 522), another treaty was negotiated between the Government and the Choctaws and Chickasaws, the

forty-third article of which provided, in effect, that the United States would not permit any white persons, other than those mentioned therein, to enter the Chickasaw Nation. (11 Stat., 769.)

By the act of March 3, 1871, now incorporated into the Revised Statutes as section 2079, the aforesaid treaty obligations were recognized and affirmed.

By the act of June 30, 1834, now section 2147 of the Revised Statutes, the officers of the Indian Bureau were authorized to remove from the Chickasaw Nation all intruders found therein, and the President was authorized to direct the military forces to be employed in such removal.

By the act of June 12, 1858, now section 2149 of the Revised Statutes, the Commissioner of Indian Affairs was given authority and he was required, with the approval of the Secretary of the Interior, to remove from the Chickasaw Nation any person being found therein *whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians.*

June 25, 1881 (17 Op. Atty. Gen., 134), Attorney-General McVeagh held that under the treaty provisions of June 22, 1855, and April 28, 1866, *supra*, the Interior Department had the power, and it was its duty, to remove all intruders from the Chickasaw Nation; and that within the meaning of the aforesaid treaties those who refused to comply with permit laws of similar import to those here involved were intruders. To the same effect is the opinion of Acting Attorney-General

Phillips of July 19, 1884 (18 Op. Atty. Gen., 34); also the report of the Senate Committee on Judiciary of February 3, 1879, made through Senator Davis, chairman. (See Senate Reports of Committees, vol. 2, Forty-fifth Congress, third session, pp. 1, 4.)

While not asserting an express repeal, appellants contend that subsequent legislation, and especially the "Curtis bill" and the act of March 3, 1901 (31 Stat., 1447), by implication repeals the treaty provisions above referred to and the sections of the Revised Statutes conferring upon the Secretary of the Interior the power and duty of supervising and managing the Chickasaw Indians and their affairs.

That treaty stipulations between the Government and the Indians and express provisions of law enacted for the protection of the Indians and their rights will not hastily or lightly be held to be repealed by implication, and that the uniform policy of the Government in dealing with the Indians will not be construed to have been repudiated or abolished by statute, unless there are apt words in the statute to that effect, seems too evident a proposition to admit of serious discussion. (*Choctaw Nation* v. *United States*, 119 U. S., 1, 27–28; *United States* v. *Choctaw, etc., Nations*, 179 id., 494, 531–533; Black on Interpretation of Laws, p. 112; Sutherland on Stat. Const., sec. 145, p. 196; *Farrell* v. *United States*, 110 Fed. Rep., 942, 951.)

In the case last cited the court said, at page 951:

> Agreements are not released or abrogated and statutes are not repealed by implication

> unless the subsequent agreements or laws are necessarily repugnant to those which preceded them. If the earlier and the later are susceptible of contemporaneous execution, they must be read, construed, and enforced together.

In that case it was held that in the absence of any express renunciation of its power by Congress with respect to Indians and their affairs, and of any treaty or act of Congress repugnant to the retention and exercise of such power, the same was retained and held by Congress.

The provisions of the "Curtis bill" are not repugnant to the treaty stipulations with the Chickasaw Indians nor with the acts of Congress conferring upon the Interior Department the control and supervision of said Indians and their affairs.

On the contrary, it contains provisions clearly showing that it was not the intention to abrogate articles 7 and 14 of the treaty of 1855, or article 43 of the treaty of 1866, or to repeal the laws conferring authority upon the Interior Department over the Chickasaw Indians and their affairs, or to abolish the long-established governmental policy in dealing with said Indians. (See secs 12, 13; par. 4 of sec. 14; secs. 16, 23, 27; pars. 12, 13, 39, and 40 of sec. 29.)

The purpose of the "Curtis bill," of the act of March 3, 1901, and of all subsequent legislation passed since the ratification of the treaties referred to and the enactment of the aforesaid sections of the Revised Statutes, as is plainly evident, was, as is well stated by Judge Shiras in *Pilgrim* v. *Beck* (69 Fed. Rep., 895, 897), to

carry out the Government's treaty stipulations with the Indians, and, further, "to develop the Indians in civilization; to educate them into habits of industry; and, by teaching them to properly cultivate the soil and draw their living therefrom, to give the lands allotted in severalty such a practical value in their eyes that ultimately they might be safely invested with the right to dispose of their holdings." The relief prayed for by the bill, if granted, would conflict with and nullify that purpose, practically resulting in placing the appellants, and others similarly situated, in charge of the lands within said nation, and ousting the United States from all control over the same.

That neither the "Curtis bill" nor the act of March 3, 1901, has the effect of depriving the officers of the Interior Department of supervision and control over the Chickasaw Indians and their affairs, nor abrogates the power previously conferred upon the Secretary of the Interior to remove all intruders from the Choctaw Nation, is fully sustained by the following authorities: *Maxey* v. *Wright* (54 S. W. Rep., 807); s. c., on appeal (105 Fed. Rep., 1003); *Buster et al.* v. *Wright et al.* (69 S. W., 882); Opinion of Attorney-General Griggs (23 Op. Atty. Gen., 214); Opinion of Attorney-General Knox (same, 528); *Eells* v. *Ross* (64 Fed. Rep., 417); *Beck* v. *Flournoy Live Stock Co.* (65 Fed. Rep., 30, 35); *U. S.* v. *Flournoy, etc., Co.* (69 Fed. Rep., 895); *Farrell* v. *U. S.* (110 Fed. Rep., 942); *State* v. *Columbia George* (65 Pac. Rep., 604); *Cherokee Nation et al.* v. *Hitchcock*, decided by the Supreme Court of the United States

December 1, 1902; 187 U. S., ——; *United States* v. *Rickert*, decided by the Supreme Court February 23, 1903; 187 U. S., ——.

In the case of *Cherokee Nation* v. *Hitchcock*, *supra*, the question whether the provisions of the "Curtis bill" and the act of March 1, 1901, abrogated the power previously conferred upon the Secretary of the Interior to superintend and control the Indians of the nations known as the Five Civilized Tribes, was directly raised in the bill filed by the Cherokee Nation, and was disposed of by the Supreme Court in the negative. Upon this point the court held that the control and development of the tribal property still remained, notwithstanding said acts, "subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation." To the same effect is *United States* v. *Rickert*, *supra*.

January 6, 1900, the court of appeals of the Indian Territory (54 S. W. Rep., 807, 810) held that the power to remove intruders for the causes assigned by the aforesaid treaty provisions, or the aforesaid sections of the Revised Statutes, still remain as before in the Interior Department, unaffected by the provisions of the so-called "Curtis bill," and that said bill recognized the continued authority of the Interior Department in this respect. This case was appealed to the United States circuit court for the eighth judicial circuit and affirmed by that court. (See 105 Fed. Rep., 1003.)

Later the court of appeals of the Indian Territory, in *Buster et al.* v. *Wright et al.* (69 Fed. Rep., 882), approved the holding theretofore made in *Maxey* v. *Wright*, and (p. 884) in this connection said:

> The power of the Interior Department of the United States Government to remove white men from the Indian Territory who refuse to pay such amounts as may be required by the laws of the Creek Nation for the privilege of being permitted to come into the nation and engage in business therein, we simply refer to the case of *Maxey* v. *Wright*, heretofore decided by us, and which was affirmed by the United States circuit court of appeals for the eighth circuit.

Further along in this same opinion, same page, the court held that the Secretary of the Interior might find the fact that a man was an intruder because of his failure to comply with the conditions upon which he is permitted to enter the nation; and further, that he had authority to put him out:

Kloski v. *Wright*, decided in the district court for the southern district of the Indian Territory a year after the decision rendered in *Maxey* v. *Wright* by the court of appeals for the Territory, involved the power and right of the Government officials, under orders of the Commissioner of Indian Affairs, approved by the Secretary of the Interior, to remove from the nation the complainants, who were merchants living at the town of Ardmore, as persons whose presence was detrimental to the peace and welfare of the Indian Nation under

the provision of the Revised Statutes of the United States. The court, among other things, said:

> This question has been settled by the court of appeals of the Indian Territory, and said decision affirmed by the United States court of appeals of the eighth circuit, in the case of *Maxey* v. *Wright*, against the contention of plaintiffs. The only remedy left the complainants is an appeal to Congress.

In *Beck* v. *Flournoy Live Stock, etc., Co., supra*, the United States circuit court of appeals for the eighth circuit, in disposing of the question raised, to the effect that the Dawes Act by conferring the right of citizenship upon Indians gave to such Indians as accepted the benefits of said act the unrestricted power to sell, use, and control all of their property whatsoever in which they chanced to have an interest, held that the provisions of said act did not give to such Indian unrestricted power over their own property, and in that case sustained the authority claimed by the Secretary of the Interior to remove an intruder from the lands belonging to an Indian who had accepted the benefits of said act.

In *Eells* v. *Ross*, *supra*, Ross, complainant, applied for and procured an injunction against Eells, Indian agent, and other officers of the United States, restraining them from interfering with the building of a railroad across certain lands within the Puyallup Indian Reservation, State of Washington. The lands in question, part of a reservation, had been allotted to John Cook and Susan Cook, Indians, under the provisions of

the Dawes Act. The patent to the lands allotted to Cooks contained a provision against alienation. They had power to lease the lands on certain contingencies, under regulations of the Secretary of the Interior, etc.

They had given permission to Ross to occupy the lands for six months, with his tents, camps, etc., for the purpose of locating a railroad. Eells, the Indian agent, and his codefendants, United States Army officers, in pursuance of instructions from the Indian Bureau, went upon the said lands with the purpose of ejecting Ross and the men in his employ. Upon appeal by Eells and his codefendants, the judgment of the lower court granting the injunction was reversed and the bill dismissed. Among other things the United States circuit court of appeals, McKenna, C. J., said:

> If the land was an Indian reservation, the agent had a right to remove all persons found there contrary to law. (64 Fed. Rep., 417, 419; 29 U. S. App., 59, 65.)

In *State* v. *Columbia George* (*supra*), the supreme court of the State of Oregon, in disposing of the contention in that case, that the conferring of the right of citizenship upon Indians abrogated the power of the Interior Department to control them and their affairs, said (p. 610):

> That citizenship, such as extends within the purview of the Dawes Act to Indian allottees, is neither inconsistent nor incompatible with the status of the tribal Indians; that the Government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the

> tribes, indulging them yet a little while, but with greatly restricted authority, in their primitive government; and until the General Government has taken its hands off, and relinquished supervision over its Indians, the State court can not assume jurisdiction touching the criminal acts of one against another.

In *Farrell* v. *United States*, *supra*, Farrell had been convicted in the United States district court under an indictment charging him with selling liquor to an Indian, a member of the Sioux tribe, in violation of the laws of the United States. To obtain a reversal of the judgment rendered upon the verdict, Farrell appealed to the United States circuit court of appeals for the eighth judicial circuit, relying chiefly upon the facts that the Indian to whom he had sold the liquor was, under the Dawes Act, a full-fledged citizen of the United States, and entitled to vote and hold office under the constitution and laws of South Dakota, where he resided and where the alleged offense was committed. That court held, notwithstanding these facts, that the judgment rendered upon the verdict should not be set aside. This case is a very instructive one upon many points involved in this proceeding.

September 7, 1900, Attorney-General Griggs (vol. 23, Ops. Attys. Gen., 218) held that it was the duty of the Government to remove all intruders from the Chickasaw Nation and that the performance of this duty devolved upon the Interior Department, and in effect held that the "Curtis bill" did not have the effect

of abrogating the power previously conferred by Congress upon the Secretary of the Interior over these Indians and their affairs. To the same effect is the opinion of Attorney-General Knox, rendered September 20, 1901 (ib., 528).

The contention of the appellants to the effect that in the cases of *Buster and Jones* v. *Wright* (69 S. W., 882) and *Kelly* v. *Churchill* (69 ib., 817) the court modified the previous decision in *Maxey* v. *Wright* (54 S. W., 807) is not sustained, as an examination of the cases will disclose.

In the Buster and Jones case the bill alleged, among other things, that defendants notified plaintiffs "that unless they paid a certain sum demanded, * * *" their places of "business would be closed;" and that "it was the intention of the Secretary of the Interior to prevent them from doing business any further until they paid the sum demanded, which it is claimed is a tax on merchants levied by the authorities of the Creek Nation for the privilege of doing business in the Creek Nation." The defendants' counsel filed a demurrer to the bill, alleging "that said complaint does not state facts sufficient to constitute a cause of action." From the record in that case it appears that the license or permit fee demanded was regarded by both parties to the suit and treated by the court as a *debt*. In reversing the decree of the lower court sustaining the demurrer the court of appeals for the Indian Territory held that the collection of a *debt* could not be enforced by closing the debtor's place of business.

It is settled law that taxes are not debts, much less are permit or license fees. (Cooley on Taxation, 1st ed., p. 13; *Meriweather* v. *Garrett*, 102 U. S., 472, 514.) Had this point been made, together with the further point that the payment by plaintiffs of the amount demanded was a condition precedent to their right to transact business within the nation, it is doubtful whether the court would have declared as it did, "that the only method left for the collection of the *debt* is through the ordinary channels of the courts."

While it is true that the court held that the collection of permit fees could not be enforced by the closing of the places of business of merchants from whom such fees were due, yet it distinctly asserted that the "Secretary of the Interior may find the fact that a man is an *intruder* * * * because he fails to comply with the conditions upon which he was permitted to enter, and put him out."

It is evident from the opinion of the court in the Buster and Jones case that had defendants threatened merely to remove plaintiffs and their property from the nation, for the reason that they had failed to comply with the conditions of the permit laws, the ruling of the lower court would have been affirmed and the demurrer of the defendants sustained. This is clear from the following language taken from the opinion:

> As to the power of the Interior Department of the United States Government to remove white men from the Indian Territorry who refuse to pay such amounts as may be required by the laws of the Creek Nation for the privilege of being permitted to come into the nation

and to engage in business therein, we simply refer to the case of *Maxey* v. *Wright*, heretofore decided by us, and which was affirmed by the United States circuit court of appeals for the eighth circuit (54 S. W., 807). In that case we decided the question against the contention of the plaintiffs; and if these were the only grounds alleged in the complaint for an injunction, the action of the court below in sustaining the demurrer would be upheld. But the threat to remove the plaintiffs from the Indian Territory was not the principal ground set up in the complaint. * * * The penalty for their nonpayment, or for their having been found to be intruders, was not that they should be removed from the Territory, as provided by the treaty and the law, but that their business houses should be closed until payment should be made.

The case of Buster & Jones gives quite as much support to the position of appellees herein as to that of appellants. The case at bar does not involve closing one's business. The opinion of the court does not overcome, or attempt to do so, that part of the opinion of Attorney-General Griggs (*supra*, p. 220) wherein he advises the Secretary of the Interior as follows:

> The authority and duty of the Interior Department is, within these Indian nations, * * * to remove all cattle being pastured on the public lands without Indian permit or license.

In the case of *Kelly* v. *Churchill* the only question considered and determined by the court of appeals of the Indian Territory was that it could not take judicial notice of a law of the Cherokee Nation.

THIRD PROPOSITION.

The question of who are "intruders" is to be determined by the Secretary of the Interior, and when determined by him it can not be reviewed by the judiciary in injunction or mandamus proceedings for the reason that the determination of the question by the Secretary of the Interior involves upon his part the examination of facts and the construction of laws.

The acts of the heads of the executive department of the Government in the lines of their duties are, in contemplation of law, the acts of the President himself. See *Marbury* v. *Madison* (1 Cranch, 137–166); *Wilcox* v. *Jackson* (13 Peters, 498–513); *Woolsey* v. *Chapman* (101 U. S., 755–770); In re Nagle (39 Fed. Rep., 833–860); *United States* v. *Mullin* (71 Fed. Rep., 682–686). This being true, before the court should declare any rule or regulation prescribed by the head of an executive department as illegal, it should be made clearly to appear that it is so.

The determination of who are intruders within an Indian nation involves the investigation of facts and the examination and construction of laws; hence, is judicial not ministerial in its nature, and its determination is not subject to review by the courts in injunction proceedings. See *Dunlap* v. *Black* (128 U. S., 40–48); *Mississippi* v. *Johnson* (4 Wallace, 475–498); *Gaines* v. *Thompson* (7 Wallace, 347–573); *United States* v. *Commissioner* (5 Wallace, 563 .

In *Dunlap* v. *Black*, it is said:

> The court will not interfere by mandamus with the executive officers of the Government

in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them.

Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

FOURTH PROPOSITION.

The Chickasaw Nation is a distinct political society, possessing, by reason of Congressional delegation, power and authority to regulate its own domestic affairs and to enact its own laws, though such laws may not be in conflict with the Constitution of the United States nor in conflict with the laws of Congress.

Prior to the passage of the act of March 3, 1871 (16 Stat., 566; sec. 2079, Rev. Stat.), all negotiations between the Government and the Indian tribes were conducted by way of treaties in an international sense. *Lone Wolf et al.* v. *Hitchcock*, 30 Wash. L. R., 166–168; *United States* v. *Kagama*, 118 U. S., 375, 382.)

Since 1871 the Government has dealt with the Indians by direct legislative enactment or by way of convention or contract, as Congress may authorize or approve. (*Choctaw Nation* v. *United States*, 119 U. S., 1, 27; *Stephens* v. *Cherokee Nation*, 174 U. S., 445, 483; *Lone Wolf et al.* v. *Hitchcock*, *supra.*)

Since the decision of the Supreme Court of the United States, rendered in 1831 (opinion by Chief Justice Marshall, *Cherokee Nation* v. *State of Georgia*, 5 Peters, 1), the Indian tribes have been regarded and treated by the United States as separate dependent nations. (*United States* v. *Kagama*, *supra*, 375, 382–384; *Lone Wolf et al.* v. *Hitchcock*, *supra.*)

The treaties heretofore cited guaranteed to the Chickasaw Nation that it should be secure from and against all laws, except such as from time to time might be enacted by its own national council, not inconsistent with the Constitution, treaties, and laws of the United States, and also guaranteed them legislative power over their own domestic affairs. The legislative power of the nation so guaranteed has been recognized by Congress in the act of May 2, 1890, providing for a temporary government for the Territory of Oklahoma (26 Stat., 81; see *Raymond* v. *Raymond*, 83 Fed. Rep.,

721, 723), by the act of June 7, 1897 (30 Stat., 84), being the appropriation act for the contingent expenses of the Indian Department for the year 1897, and by sections 29 and 33 of the Curtis bill (30 Stat., 512, 518).

The treaties entered into between the United States and each of the five civilized tribes of Indians, namely, the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, are substantially alike with respect to the right of self-government of each tribe.

In *Mehlin* v. *Ice* (56 Fed. Rep., 12, 17) the United States circuit court of appeals for the eighth judicial circuit said, among other things:

> The right of self-government has always been claimed and exercised by the Cherokee Nation. Their rights in this regard, so far as relate to their own country and people, have never been questioned by the United States. Nor is it true that the United States has always denied the Cherokees jurisdiction over white intruders in their country.

In *Crabtree* v. *Madden* (54 Fed. Rep., 426–429) the same court says:

> These treaties and this legislation demonstrate that this Creek tribe has carefully preserved its separate political identity and that it is still managing its own affairs and exercises, through officers of its own selection, legislative, executive, and judicial functions within its territorial jurisdiction.

See also in this connection *Alberty* v. *United States* (162 U. S., 499–502–504); *Nofire* v. *United States* (164

id., 657–662); *United States* v. *Choctaw and Chickasaw Nations* (179 id., 494–520); *Beecher* v. *Weatherby* (95 id., 517–526); *Exendine et al.* v. *Pore* (56 Fed. Rep., 777–778). In *United States* v. *Choctaw and Chickasaw Nations* it was held that the provisions of article 7 of the treaty of 1855, *supra*, were still in existence, and "secured to each tribe the unrestricted right of self-government, and, with certain exceptions not necessary to be here stated, jurisdiction over personal property within their respective limits."

In the case of *Crabtree* v. *Madden* (*supra*), which arose before the abolition of tribal courts by the Curtis bill, a suit had been brought in the United States court in the Indian Territory by the Creek Nation, and Crabtree, as the national tax collector for that nation, to collect a permit fee imposed by a law of the nation upon Madden as a licensed trader, whose business was that of a builder of houses and dealer in furniture in the nation. Madden, the defendant, being a citizen of the United States and not a member of the tribe, filed a demurrer to the complaint. The demurrer was sustained. Plaintiffs sued out a writ of error to the United States circuit court of appeals for the eighth circuit. In that court it was said (p. 165): "The tax which it is sought to collect by this action was imposed by the laws of this [Creek] tribe. If the tribe had lawful authority to impose it, it had equal powers to prescribe the remedies and designate the officers to collect it. The presumption is that it has done so, and that it has provided some of the remedies usually prescribed for that purpose."

FIFTH PROPOSITION.

The act of the Chickasaw national council in question is a valid exercise of the power conferred by Congressional delegation, in that it provides for the raising of revenue for the support of its local government, and prescribes the conditions upon which persons not members of the tribe, and their property, may come into and remain within the Indian Nation, and what persons and property are deemed detrimental to its peace and welfare. Said act neither conflicts with the Constitution of the United States nor with any act of Congress; but even did it so conflict, appellants are estopped from denying its validity, for the reason that they have accepted benefits conferred by it.

It is claimed by appellants that the act in question is invalid because section 8, Article III, of the Federal Constitution confers upon Congress the exclusive power to enact such a law, and that this power can not be delegated to the Chickasaw Nation, because it is a taxing power, and only a sovereign power can pass a law for the levying and collection of taxes; because it fixes no time nor place when and where the taxes shall be paid; because it provides no penalty for failure to pay; because it can not be enforced by the tribal authorities; and because it makes a discrimination against citizens of the United States not members of the tribe.

Congress has full, complete, and exclusive power to legislate for a Territory. It is well settled, as will be seen by authorities hereinafter cited, that Congress may delegate its power to legislate for a Territory to a local government. By the Constitution Congress has full,

complete, and exclusive power to legislate for an Indian nation or tribe. As well might it be said that Congress can not delegate the power to legislate for a Territory as to undertake to maintain that it can not delegate limited legislative power to an Indian nation or tribe. Neither a Territory nor an Indian nation is sovereign in any sense. Each is a dependency. The Territories always have exercised, unquestioned by the courts, the the power of levying and collecting taxes. (See *Board of Trustees* v *State of Indiana*, 14 How., 268, 273; *Rogers* v. *Burlington*, 3 Wall., 654, 662; *Union Pacific Ry. Co.* v. *City of Cheyenne*, 113 U. S., 516; *Talbot* v. *Silver Bow Co.*, 139 U. S., 438, 446.) All the authorities agree that a Territorial legislature has the same power with respect to the levying and collection of taxes as has the legislature of a State, and that this power can be delegated to counties and municipal corporations. (Dillon on Municipal Corporations, vol. 2, second ed., sec. 741; *Rogers* v. *Burlington*, *supra.*)

In addition, it would seem from the following that Congress may delegate to the Chickasaw Nation the power to pass an act of the kind in question.

October 17, 1876, the Chickasaw council passed the following act, which is similar in principle to the one here in question:

PERMIT LAW OF THE CHICKASAW NATION.

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That citizens of any State or Territory of the United States wishing to hire or rent land, or be otherwise employed in this

nation, shall be required to enter into contract with a citizen; said contract to be reported by the citizen to the county clerk of the county where said citizen resides.

SEC. 2. *Be it further enacted*, That any citizen who shall employ any noncitizen shall apply within fifteen days after entering into contract to the clerk of the county where said noncitizen wishes to reside for a permit for male noncitizen over the age of eighteen years in his employ, and for each permit so obtained the noncitizen shall pay to the clerk issuing the same the sum of twenty-five dollars, and the clerk shall retain for each permit issued twenty-five cents for his services, and shall report to the auditor and treasurer quarterly, of all money received by him for permits; and after deducting out his fee, shall pay the balance over to the treasurer for national purposes.

SEC. 3. *Be it further enacted*, That every foreigner who shall come into this nation for the purpose of farming or being otherwise employed, without the proper authority of the United States Government, shall be deemed an intruder by virtue of section 2134 of the Revised Statutes of intercourse law.

SEC. 4. *Be it further enacted*, That all licensed merchants and traders (noncitizens) shall, in addition to the tax paid on goods, be required to procure from the county clerk of the county in which they wish to trade, and all physicians, noncitizens, wishing to practice their profession, shall procure from the county clerk of the county in which they wish to trade, a permit, for which they pay each twenty-five dollars,

conditioned upon the faithful observance of the laws of this nation, and the clerks shall dispose of the funds in the manner prescribed in section two of this act.

SEC. 5. *Be it further enacted*, That no permit shall be granted for a longer time than twelve months; and in case of violation of any law of this nation, the offender shall be ordered out of the limits of the Chickasaw Nation. And any citizen who shall employ any noncitizen for a longer time than fifteen days without procuring a permit for the same shall be deemed guilty of misdemeanor, and be subject to a fine of twenty-five dollars before the county court having jurisdiction; and all fines collected under this act shall go to the county treasury for county purposes.

SEC. 6. *Be it further enacted*, That any noncitizen having entered into contract with any citizen of this nation and obtained a permit under his employ, and shall leave the employ of said citizen without his knowledge and consent, shall forfeit his permit, and no other permit shall be granted any noncitizen forfeiting the same by either clerk of either county of this nation.

SEC. 7. *Be it further enacted*, That any person living in this nation under permit shall not be allowed to bring into or hold more than five head of milch cows, and shall have no hogs outside of inclosure, but shall be allowed all the work horses, mules, and cattle as may be necessary to work said farm, and shall be allowed to feed surplus crop to beef cattle under fence.

SEC. 8. *Be it further enacted*, That all freedmen not owned by Chickasaws or Choctaws at the date of the treaty of Fort Smith shall be required by the sheriffs of the respective counties of this nation to procure permits, as provided in this act.

SEC. 9. *Be it further enacted*, That all acts and parts of acts in conflict with this act are hereby repealed, and this act take effect and be in force from and after its passage.

The Senate Committee on the Judiciary, having under consideration the validity of these permit laws, through Senator Davis, of Illinois, on February 3, 1879, reported that the same were not invalid. (See Senate Reports of Committees, vol. 2, Forty-fifth Congress, third session, pp. 1–4.)

Attorney-General MacVeagh, in his opinion given to the Secretary of the Interior (17 Att Gen. Op., *supra*), in reply to the inquiry as to whether the aforesaid Choctaw and Chickasaw laws were valid, replied that they were.

July 9, 1884, the Secretary of the Interior again referred to the Attorney-General the question of the validity of these permit laws, and also asked his opinion upon the question whether, conceding that they were valid, the Interior Department had power to revise them so as to secure reasonableness in the amount of the fees which they required from persons who applied for permits.

In reply to the first question, Acting Attorney-General Phillips (18 Op. Att. Gen., *supra*) held that said laws were valid.

In reply to the second question, it was, among other things, stated by him (see p. 39) as follows:

> In conclusion I have to say that my attention has not been called to any statute by which Congress has delegated to a department or officer of the United States its power to control such taxation. I therefore conclude that no department or officer has such power.

Acting Attorney-General Phillips further held (p. 36) that the United States by treaty had remitted the question of who were intruders within the Chickasaw Nation to its legislative body.

The importance of this declaration is found in the fact that the opinion of Acting Attorney-General Phillips has been approved by Attorneys-General Griggs and Knox in the opinions heretofore referred to, and has also been approved by the United States court of appeals in the Indian Territory, and by the United States circuit court of appeals for the eighth judicial circuit, in *Maxey* v. *Wright, supra.* "The Cherokee Nation has jurisdiction over white intruders in its country." (*Meklin* v. *Ice*, 12 U. S. App., 305, syllabus.)

The power to declare whether live stock of nonmembers of the tribe may be brought within the nation necessarily carries with it the power to prescribe the terms and conditions upon which entrance may be obtained and presence continued.

Maxey v. *Wright* (*supra*) arose subsequently to the passage of the Curtis law, and involved the question of the validity of an act of the Creek Nation imposing an

annual license fee or permit tax of $25 upon all attorneys, citizens of the United States, not members of said tribe or of the Seminole tribe, practicing their profession in the Creek Nation. The United States court for the Indian Territory, in an able and elaborate opinion delivered by Chief Justice Clayton, held that the act of the Creek Nation imposing said tax or license fee was valid. This case was appealed to the United States circuit court of appeals for the eighth circuit and affirmed (no opinion being rendered) on November 22, 1900. (See 105 Fed. Rep., p. 1003.)

In the above case (p. 809, 54 S. W. Rep.) the Indian Territory court of appeals quoted, with approval, the opinions of Attorney-General MacVeagh and Acting Attorney-General Phillips, and in this connection said:

> Article 7 of the treaty between the United States and the Choctaw and Chickasaw nations (11 Stat., 613) is, upon the question here involved, identical with article 15 of the Creek treaty; and the question as to whether these nations had the power to enforce their permit laws was passed upon by Attorney-General Wayne MacVeagh in 1881. He says: "The validity of such permits is recognized by the concluding clause of article 7 of the treaty of June 22, 1855, which is not inconsistent with the terms of the later treaty." (17 Ops. Attys. Gen., 134.) Upon the same subject Attorney-General Phillips, in 1884, says: "In absence of treaty or statutory provision to the contrary, the Choctaw and Chickasaw nations have power to regulate their own rights of occupancy, and

to say who shall participate, and upon what conditions, and hence may require permits to reside in the nations from citizens of the United States and levy a pecuniary exaction therefor.

"The clear result of all the cases, as restated in *Beecher* v. *Wetherby* (95 U. S., 526; 24 L. Ed., 442), is: 'The right of the Indians to their occupancy is as sacred as that of the United States to the fee.' I add that, so far as the United States recognize political organizations among Indians, the right of occupancy is a right in the tribe or nation. It is, of course, competent for the United States to disregard such organizations and treat Indians individually, but their policy has generally been otherwise. In such cases, presumptively, they remit all questions of individual right to the definition of the nation as being purely domestic in character. The practical importance here of this proposition is that in the absence of express contradictory provisions by treaty or by statutes of the United States, the nation, and not a citizen, is to declare who shall come within the boundaries of its occupancy, and under what regulations and conditions. * * * (*a*) Article 7, 1855, secured to the Choctaws and Chickasaws, among other things, 'the unrestricted right of self-government and free jurisdiction over persons and property within their respective limits, excepting, however, all persons or their property who are not by birth, adoption, or otherwise citizens or members of either tribe,' etc. I submit that whatever this may mean it does not limit the right of these tribes to pass upon the question who (of persons indifferent to the

United States, *i. e.*, neither employees, nor objectionable) shall share their occupancy, and upon what terms."

December 14, 1898, the council of the Chickasaw Nation passed an act entitled "An act to provide for a more equitable permit tax, and for other purposes." (See Constitution, Treaties, and Laws of the Chickasaw Nation, 1899, pp. 440–442.) This act was also similar in principle to the one here in question. Sections 1, 2, 3, 9, and 10 of said law are as follows:

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation,* That hereafter all adult males, over the age of eighteen years, who are noncitizens and now residing in the Chickasaw Nation, or who may hereafter move to this nation, for the purpose of residing in the same, shall be required to pay an annual permit tax of one dollar each for the privilege of residing in this nation.

SEC 2. That any noncitizen who owns horses, jacks, jennets, mules, or other cattle, and who holds them upon the public domain or within the Chickasaw Nation, shall be required to pay an annual permit tax of twenty-five cents per head for each horse, jack or jennet, mule or bovine, and five cents per head for each sheep and goat so held within this nation.

Provided, That two cows and calves, and two horses, or two mules or one horse and one mule, or two work oxen, belonging to each head of a family shall be exempt from the provisions of this act; and that the owner of any cattle subject to taxation under this act shall be required to make oath, before some notary public,

or other officer authorized to administer oaths, as to the number of cattle named herein and owned and held by him in the Chickasaw Nation, before any permit collector shall deliver to him a clear receipt for the year for which he shall have paid; and all said affidavits shall be turned over to the national auditor by the permit collector with his quarterly report hereinafter required.

SEC. 3. That all taxes or permits under the provisions of this act shall be paid annually in advance to the permit collector of each county in the Chickasaw Nation, and each collector shall receive twenty per centum of all amounts collected by him for his services.

SEC. 9. That any noncitizen subject to a permit tax under the provisions of section 1 of this act, and who shall refuse to pay his permit tax, after due notice for thirty days, shall be deemed an intruder by virtue of the intercourse law of the United States of America and subject to removal; and such intruder shall be reported to the United States Indian agent (or inspector) to the Five Civilized Tribes, and shall forthwith be removed from the Chickasaw Nation, under the direction of the said United States Indian agent or inspector.

SEC. 10. That when any horse, jack, jennet, or other cattle subject to a permit tax under section 2 of this act shall be found within the Chickasaw Nation for sixty days, and upon which the permit tax herein required has not been paid, the same shall be reported straightway to the United States Indian agent (or inspector) to the Five Civilized Tribes, and advertised and sold to the highest bidder at public

> sale under his direction, to pay said permit tax due and for the cost of advertising and selling same; that the amount over and above said tax and costs shall be deposited with the said United States Indian agent (or inspector) to be paid to the owner of said horse, jack, jennet, or other cattle so sold.

August 13, 1900, the Secretary of the Interior referred this act to the Attorney-General for an opinion thereon, and in that connection submitted to him the following questions:

> Have these nations the right to require noncitizens to pay a permit tax or license fee for the privilege of engaging in business within their boundaries?
>
> Can a noncitizen be lawfully permitted to hold and pasture cattle upon the lands of such nation without paying the tax prescribed by the nation for such privilege?
>
> Did the Indian Territory, by reason of the provisions of the act of June 28, 1898, authorizing the sale of town lots to noncitizens, cease to be Indian country so that the provisions of sections 2147–2150, Revised Statutes, do not apply there?

In reply, Attorney-General Griggs (vol. 23, Ops. Attys. Gen., pp. 214, 216), among other things, says:

> Without referring specially to the different treaties with these Indian nations, it may be stated that they provide that all persons not citizens of such nations or members of any Indian tribe found within the limits of such nation should be considered as intruders, and be

removed from and kept out of the same by the United States. From this class of intruders are excepted the employees of the Government and their families and servants; employees of any internal improvement company; travelers and temporary sojourners; those holding permits from any of the Indian tribes to remain within their limits, and white persons who, under their laws, are employed as "teachers, mechanics, or skilled in agriculture."

It is apparent, therefore, that, save the excepted classes, no one not a citizen or member of a tribe can be lawfully within these limits without Indian permission, and equally apparent that all may be so with such permission; and it follows that the same power that can refuse or grant such permission can equally impose the terms on which it is granted.

So far as concerns the Choctaw and Chickasaw nations (and the same rule applies to the others), this question was passed upon by my predecessor, Attorney-General Wayne MacVeagh, who held (17 Opin., 134) that such permit and license laws, with their tax, were valid and must be enforced. The same doctrine was held by Acting Attorney-General Phillips, in 18 Opinions, 34. Both these opinions are cited by the court of appeals of Indian Territory in *Maxey* v. *Wright* (54 S. W. Repr., 807), which distinctly affirms the validity of this legislation. I quite agree with these opinions, and have no doubt that it is competent for those Indian nations to prescribe the terms, here being considered, upon which they will permit outsiders to reside or carry on business within their limits.

> Nor does the act of June 28, 1898 (30 Stat., 495), either deprive these nations of the power to enact such legislation or exempt purchasers of town or city lots from its operations.

September 20, 1901, Attorney-General Knox, in an opinion given to the Secretary of the Interior, *supra* (pp. 528, 529), among other things, says:

> I have the honor to reply to your note of August 27, 1901, in which you request my official opinion whether your Department has authority under existing laws to collect the tribal tax imposed by the laws of the Cherokee Nation of Indians upon the exportation of prairie hay from that nation.
>
> The situation is this: Under the right of self-government conferred by Congress, the Cherokee Nation has its own constitution, government, and laws, not inconsistent with the Constitution or laws of the United States. By act of Congress these laws are first approved by the President. When so approved they have, in all respects, the force and effect of laws This autonomy carries with it the unquestionable right of taxation. Under this power the Cherokee Nation imposes a tax of 20 cents per ton upon all prairie hay shipped out of and beyond the limits of that nation. (Laws of the Cherokee Nation, sections 374, 375.) In my opinion, there can be no question of the right or power of that nation to impose such a tax.
>
> For reasons satisfactory to both nations, the United States collects the tribal taxes imposed and the royalties and rents from the public domain and deposits them in the United States

> Treasury to the credit of the Indian nation. The power and right to do this, by and through the Interior Department, is agreeably affirmed by the United States court of appeals, Indian Territory, in *Maxey* v. *Wright*, (54 S. W. Repr., 807), under existing treaties and acts of Congress. While that decision was rendered with reference to the Creek Nation, it is just as applicable to the Cherokee Nation also, for similar treaties and laws exist as to that nation.

With respect to the objection urged against the validity of the act, to the effect that it is inoperative because it fixes no time or place, nor provides any method for its collection by the tribal authorities, nor affixes any penalty for failure to comply with its terms, we submit that the objection is untenable. Section 4 designates the time when the taxes shall be due and payable; it also affixes a penalty for failure to pay, by providing that the live stock of those who do not pay "shall be held to be in the Chickasaw Nation without its consent and unlawfully, etc., and the presence of such live stock and the owners or holders thereof within the limits of said nation shall be deemed detrimental to the peace and welfare of the Chickasaw Indians." By section 2 it is provided that the taxes shall be collected by such person or persons as may be designated by the Secretary of the Interior.

It is not essential to the validity of the act that a member of the tribe should have been designated to collect the tax and that the tribal authorities should have power to enforce its provisions. The tribe having

authority to enact the law prescribing the tax, it had equal authority to prescribe the remedies and to designate the persons to collect it. (*Crabtree* v. *Madden*, *supra*.) It was within the scope of the power and authority conferred upon the Chickasaw national council to provide in the act that the tax be collected and the law enforced by the officers of that department of the Government having superintendence and control over said nation and its affairs. This point, however, will be more fully discussed under the sixth and seventh propositions.

The validity of the act in question, however, even if it be conceded that it is a taxing law, is not to be determined solely by the principles applicable to a taxing statute. If the statute is in any respect a valid exercise of the power conferred by Congress upon the Chickasaw Nation, it matters not that its provisions may not be in harmony with the underlying principles of taxing laws.

It is further contended that the act is invalid because it discriminates against citizens, nonmembers of tribes, and thereby conflicts with section 3, Article IV, of the Constitution, which reads: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This provision of the Constitution is a limitation upon the power of the States and not a limitation upon the power of the Federal Government. Its purpose is to prevent *States* from discriminating in favor of their own people against those of other States. (*Williams* v. *Bruffey*, 96 U. S., 176,

188.) The provision has no application to a Territory, much less to an Indian nation.

Congress has full and unrestricted legislative power over the Territories, and this power may be exercised through a local government. (*Endlemann* v. *United States*, C. C. A., 9th Cir.; 86 Fed. Rep., 456–459.) This power is derived from Article IV, section 3, paragraph 2, of the Constitution, which declares "the Congress shall have power to dispose of and make all rules and regulations respecting the territory or other property belonging to the United States." The power of Congress to legislate for the Indian nations is derived rom section 8, Article I, of the Federal Constitution, which provides that "Congress shall have power to regulate commerce with the Indian tribes." (*United States* v. *Holliday*, 3 Wall., 407, 417.) No greater power is conferred upon Congress by section 3, Article IV, with respect to Territories, than is conferred upon it by section 8 of Article III, with respect to the Indians. The power of Congress with respect to the Territories has been fully considered in the case of *Endlemann* v. *United States*, *supra*, and in the following cases: Mormon Church case (136 U. S., 1, 42--44); *Clinton* v. *Englebrecht* (13 Wall., 434, 441, 447); *National Bank* v. *County of Yankton* (101 U. S., 129); *Murphy* v. *Ramsey* (114 Id., 15); *Shively* v. *Bowlby* (152 Id., 48); *Hornbuckle* v. *Toombs* (18 Wall., 648, 655).

In the Mormon Church case it was held (p. 44):

> Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights

> which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers than by an express and direct application of its provisions."

In *Endleman* v. *United States*, *supra*, it is said (syllabi): "Congress has full legislative power over the Territories, unrestricted by the limitations of the Constitution."

The principles set forth in the foregoing cases with respect to the power of Congress over the Territories apply with equal force to its power over the Indian nations.

That the legislative power of Congress over an Indian nation may be exercised, unrestricted by constitutional provisions, seems to be conceded by appellants. In their brief (p. 38) they say: "It was not generally supposed that the Constitution of the United States and its guarantees extended to this (meaning Indian) country, and it was certainly impossible to there give them practical effect." They insist, however, that the lands belonging to the Chickasaw tribe is not Indian country.

Unfortunately for the appellants, the Supreme Court has decided to the contrary in repeatedly holding that "Indian country" is all country to which the Indian title has not been extinguished. (19 Op. Atty. Gen., 511.)

But if it be conceded that section 2 of article 4 of the Constitution is a restriction upon the power of Con

gress to legislate for an Indian nation, the act in question can not be held to be in conflict therewith, for the reason that the "privileges and immunities" belonging to citizens by virtue of citizenship are *personal* rights—that is, *private* rights as distinguished from *public* rights. (*Campbell* v. *Morris*, 4 Wash. C. C., 371.)

The provision in the Constitution referred to does not prevent a State from imposing a tax upon a foreign corporation as a condition for it to do business within the State, even where no such tax is imposed upon corporations organized under the laws of the State. Nor does the "privileges and immunities" clause referred to prohibit a State from passing a law prohibiting nonresidents of the State from engaging in the liquor traffic within the State, even where the laws of such State permit residents to so engage. (*Kohn* v. *Melcher*, 29 Fed. Rep., 433.) The "privileges and immunities" clause does not include the right to enjoy public property held in common, as will hereafter be seen by authorities referred to.

The lands herein involved are the property of the Chickasaw Nation. They are public lands. (*Stephens* v. *Chickasaw Nation*, 174 U. S., 445, 488.)

The nation may (just as a State under the same circumstances might) exclusively control said property, and, in controlling it, declare that its own citizens shall be entitled to a preference right of enjoyment as against the citizens of other States and Territories having no interest therein. The nation owns the lands and grass just as a farmer owns his farm, and it has the same right to say who may and who may not pasture their

cattle in the reservation, and to prescribe the terms, as the owner of a farm, to say who may pasture cattle upon his lands and to prescribe the terms for such pasture.

Section 2 of Article IV of the Constitution does not confer a private right upon appellants to participate on equal terms with citizens of the Chickasaw Nation in the right of pasturing live stock on the lands belonging to it. These lands are the common property of the nation. The individual Indians, members of the nation, are tenants in common. They are, as a nation, so exclusively entitled to the lands and the grass thereon that the lands and grass can not be enjoyed by others without the permission of the nation. (*Corfield* v. *Coryell*, 4 Wash. C. C., 3 1; s. c. Fed. Cas., vol. 6, No. 3230, pp. 546, 552.) The above case involved the validity of a law of the State of New Jersey which provided, among other things—

> That it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this State to rake or gather clams, oysters, or shells in any of the rivers, bays, or waters in this State, on board of any canoe, flat, scow, boat, or other vessel not wholly owned by some person inhabitant of and actually residing in this State; and every person offending herein shall forfeit and pay $10, to be recovered, etc.; and shall also forfeit the canoe, flat, etc., employed in the commission of such offense, with all the clams, oysters, shells, rakes, tongs, tackle, furniture, and apparel in and belonging to the same.

It was contended, in opposition to its validity, that the above provision infringed said section 2, Article IV. In disposing of the contention, the court said:

> But we can not accede to the proposition, which was insisted on by the counsel, that under this provision of the Constitution the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens.

McCready v. *Virginia* (94 U. S., 391) involved the validity of a statute of Virginia prohibiting any person other than a citizen of that State from taking or catching oysters or shellfish, or planting oysters, in waters in that State. The court, at page 394, says:

> The precise question to be determined in this case is whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege.
>
> The principle has long been settled in this court that each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. * * * In like manner the States own the tide waters themselves and the fish in them so far as they are capable of ownership while running. For this purpose

the State represents its people, and the ownership is that of the people in their united sovereignty. (*Martin* v. *Waddell*, 16 Pet., 410.) The title thus held is subject to the paramount right of navigation, the regulation of which in respect to foreign and interstate commerce has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right and not a mere privilege or immunity of citizenship.

After referring to the contention of the plaintiff in error that the Virginia statute was in violation of that clause of the Federal Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," the court (p. 395) proceeds:

> We think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State If Virginia had by law provided for the sale of

its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious; the right thus granted is not a privilege or immunity of general, but of special citizenship. It does not "belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it not by virtue of citizenship merely, but by citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it can not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the

common property, the conclusion would seem to follow that it might by appropriate legislation confine the use of the whole to its own people alone.

COMPLAINANTS ESTOPPED FROM DENYING VALIDITY OF THE ACT.

Even though it should be held that the act of the Chickasaw council complained of is invalid, it is plainly manifest that only by its provisions were plaintiffs permitted to take and keep their live stock within the limits of the nation. They have accepted the benefits conferred by the act, and will not now be heard to deny or question its validity. (Black's Const. Law, 2d ed., p. 59; Bigelow on Estoppel, 2d ed., 509; *Ferguson* v. *Landram*, 5 Bush (Ky.), 230; *Todd* v. *Kerr*, 42 Barb., 319; *People* v. *Murray et al.*, 5 Hill, 468; *Lindsay* v. *Mullen*, 176 U. S, 126, 146; *O'Brien* v. *Wheelock*, 184 *id.*, 450, 491.)

Ferguson v. *Landram* (*supra*) was a case where, to avoid the draft in 1864, a large portion of the people of Gallatin County, Ky., met at the county seat and resolved to raise $20,000 as a military fund to be distributed among those who should thereafter volunteer, in addition to the bounty offered by the Federal Government, and appointed a committee to borrow the money and to obtain an act of the legislature to authorize the county court to issue bonds and to levy a tax to reimburse the money so expended. The money was borrowed, the volunteers obtained, the draft prevented, the necessary act of the legislature passed, the

bonds issued, and the tax was levied by the court. Subsequently a number of the taxpayers of the county instituted injunction proceedings to prevent the levying of the tax under said act upon the ground that the act was unconstitutional. Held (1) that the act was unconstitutional; (2) that the following persons were estopped from denying its constitutionality: All persons who were themselves liable to draft, or had minor sons or slaves so liable; all who had participated in the procurement of the law or afterwards voluntarily ratified it, especially such as had relatives liable to be conscripted. In deciding the case the court, among other things, said (p. 146):

> Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent, or subsequently sanctioned by him, or from which he derives an interest and consideration, and then keep the consideration and repudiate the statute as unconstitutional?

People v. *Murray* (*supra*) involved the validity of a statute which, after authorizing certain persons to erect a dam across a river, provided that they should execute a bond to the people, conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam; that any person conceiving himself aggrieved might apply to a county judge for the appointment of a justice of the peace to inquire and ascertain whether such person had sustained damages by reason of the dam; that the assessment of the justice of the peace

should be signed by him and filed in the office of the county clerk; that if the damages assessed were not paid within a specified time the person entitled thereto might prosecute the bond, and that a certified copy of the assessment should be conclusive evidence of the amount of the damages. *Held*, in an action upon the bond, that the assessment was conclusive as to the amount of damages and also of the fact that they were caused by the erection of the dam. *Held* further, that the defendants, having acted under the statute by building the dam, were not at liberty to question the constitutionality of the provision relating to the mode of assessing the damages. In answer to the suggestion that the provision of the act which made the assessment of the justice conclusive upon the parties was unconstitutional the court (p. 472) said:

> The short answer is that the defendants took the grant to build the dam with this condition attached to it; and they are not now at liberty to make the objection, though under other conditions is might have been effectual.

A person who avails himself of the benefits conferred upon him by a particular statute thereby agrees to comply with the condition annexed to the benefit and will not be heard to complain that the conditions are illegal. (*Lindsay* v. *Mullen*, *supra.*)

Says the court, through Fuller, C. J., in *O'Brien* v. *Wheelock*, *supra* (p. 491):

> Although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that ben-

fit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced.

SIXTH AND SEVENTH PROPOSITIONS.

The Secretary of the Interior is vested by Congress with full power and authority to prescribe appropriate rules and regulations for the enforcement of the act of the Chickasaw Nation in question, and it is his duty to do so.

The making and promulgating of the rules in question were an appropriate exercise of the power conferred upon the Secretary of the Interior, and said rules are not in conflict with any provision of the Constitution of the United States or with any law of Congress, nor will the enforcement thereof violate any rights of the appellants.

By section 463 of the Revised Statutes the management of the Indians and their affairs, under the direction of the Secretary of the Interior, shall be "agreeably to such regulations as the President may prescribe," and by section 465 the President is authorized to prescribe such rules and regulations as he may think fit for the purpose of carrying into effect the various provisions of any act relating to Indian affairs, etc. It needs no citation of authorities to show that the provisions of the aforesaid sections vest in the Interior Department the power to make all appropriate rules and regulations with respect to the supervision and control of Indians and their affairs, subject to the approval of

the President, as it is a well-known fact that the President acts in these matters through the heads of the different departments, and their acts are, in contemplation of law, his acts.

The contention of the appellants to the effect that the Secretary of the Interior claims to derive his authority and bases his power to name the persons to collect the taxes and to prescribe the rules and regulations for their collection, and that whether he claims so or not he is estopped from basing such power and authority upon the acts of Congress because of certain language employed by him in the rules and regulations, we respectfully submit is not worthy of serious consideration. The Secretary does not claim authority to prescribe the rules and regulations in question from any power conferred by the act of the Chickasaw Nation. He claims such authority by virtue of, and the same is based upon, acts of Congress. By reason of the passage of the act of the Chickasaw Nation in question, it became his duty to exercise this power. It was in "pursuance of" such act that he exercises that power. But even though the Secretary did claim that the act in question conferred upon him the power to make the rules and regulations complained of, upon what principle of law can it be claimed that he is now estopped from basing his authority upon perfectly legal grounds?

The fact that Congress, by the twenty-sixth section of the "Curtis bill," withheld from the United States courts in the Indian Territory the authority to enforce

tribal laws means not that those laws shall not be enforced anywhere or by anybody, but rather that their enforcement shall be left to the executive authorities of the tribe and to those of the United States. If this were not so, section 29, page 512, and section 33, page 518, of the same act, recognizing in express terms the authority of the tribes to make laws, would be meaningless, and the several provisions requiring those laws to be submitted to the President for his approval or rejection would work an intolerable injustice by occupying the President's time and attention without purpose. As has been seen, where there is authority for making laws, there is of necessity authority for their enforcement.

By withholding from the United States courts in the Indian Territory authority to enforce tribal laws, Congress did not thereby invest those courts or any other court with authority to prevent the executive officers of the tribal government or those of the United States from enforcing such tribal laws. Nor did Congress thereby intend to prevent any court from giving appropriate recognition to those tribal laws in instances where the tribal officers or the executive officers of the United States are, in suits by individuals, sought to be interrupted or disturbed in their administration and enforcement.

As there is no specific provision in the Curtis Act to the contrary, the administration and execution of tribal laws fall within the jurisdiction of that branch of the

Government which has the supervision and management of the Indians and their affairs. (*Bishop of Nesqually* v. *Gibbon*, 158 U. S., 155, 167; Indian Allotments, 28 L. D., 564–567.)

The act of the Chickasaw Nation in question (approved by the Chickasaw governor May 3, 1902, *and by the President of the United States* May 15, 1902—see Exhibit A to bill), provides:

> SEC. 2. That such privilege or permit taxes shall hereafter be payable to such person or persons, and collected under such rules and regulations as may be prescribed by the Secretary of the Interior.
>
> SEC. 4. That such privilege or permit taxes shall be due and payable annually, upon demand, and if such taxes are not paid when demanded, the live stock upon which such taxes are due shall be held to be in the Chickasaw Nation without its consent, and *unlawfully* upon the land of the Chickasaws, and the presence of such live stock and owners or holders thereof within the limits of said nation shall be deemed detrimental to the peace and welfare of the Chickasaw Indians.

The Chickasaw national council having declared that the nonpayment of the permit fees would render the further presence in the nation of the live stock and the holder or owner unlawful, etc., it became the duty of the Interior Department, under its general power over Indians and their affairs, to determine whether those who failed or refused to pay the fees so imposed were intruders, as that term is used in the treaty of

1855. (*Maxey* v. *Wright*, *supra*; *Buster & Jones et al.* v. *J. George Wright et al.*, *supra*. Opinion Attorney-General Knox, *supra*, p. 529.)

That Department was also clothed with power and authority to prescribe rules and regulations for the enforcement of said act by removing from the nation the intruders and their property. (Opinion Attorney-General MacVeagh, *supra;* Opinion Acting Attorney-General Phillips, *supra;* Opinion Attorney-General Griggs, *supra; United States* v. *Mullen*, 71 Fed. Rep., 682, 686.)

The approval by the President of this Chickasaw act made it a regulation prescribed by the President within the meaning of sections 463, 2058, and 2114 of the Revised Statutes, and therefore specially imposed upon the Secretary of the Interior and the other defendants the duty of administering and executing it according to its terms.

The sections of the Revised Statutes heretofore referred to were enacted under section 8, Article I, of the Federal Constitution, which provides that Congress shall have power to regulate commerce with the Indian tribes, and said sections were also enacted in discharge of the duty which Congress owed to the Indians as wards of the nation, in order that the latter might be protected in their persons and property. (See *United States* v. *Kagama*, 118 U. S., 375–383; *Choctaw Nation* v. *United States*, 119 U. S., 122; *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S., 641–653; *Stevens* v. *Cherokee Nation*, 174 U. S., 445, 484–488.)

To protect themselves and their property from the aggressions of white intruders the Chickasaw Indians,

by their council, passed the act in question, and thereby the obligation of enforcing its provisions, by removing from the nation those who failed to comply therewith, devolved upon the Interior Department. As was said by Associate Justice Miller in *United States* v. *Kagama* (118 U. S., 383, 384), there arises from the treaty stipulations with these Indians a duty devolving upon the Federal Government to protect them and their property. How, may we ask, are these treaty stipulations to be enforced and the duty of the United States Government toward the Indians to be performed unless the executive officers of the General Government have the power to carry into effect laws enacted by the Indian tribes which Congress has given them the power to pass? In *Maxey* v. *Wright* (54 S. W., 812), upon this very question, the court, among other things, says:

> It is quite clear that if, in the best judgment of that Department, it was deemed wise to take charge of the matter, and collect this money and turn it over to the Indians, it had the power to do so, under its superintending control of the Indians and the intercourse of the white men with them granted by various acts of Congress, and in our opinion that power has not been taken away by any subsequent act of Congress or treaty stipulation.

In speaking of the legislation relating to public lands, which is almost identical with sections 441, 463, 2058, etc., the Supreme Court says:

> Under this provision the sale of the public lands was placed by statute under the control

of the Secretary of the Interior. To aid him in the performance of this duty a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. (*United States* v. *Schurz*, 102 U. S., 378, 395.)

It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice. (*Williams* v. *United States*, 138 U. S., 514, 524.)

The phrase "under the direction of the Secretary of the Interior," as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department, of which he is the head.

* * * * *

The Secretary is the guardian of the people of the United States over the public lands. (*Knight* v. *United States Land Association*, 142 U. S., 161, 177, 181.)

It may be laid down as a general rule that in the absence of some specific provision to the contrary in respect to any particular grant of public land its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the

> supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is express direction to the contrary. (*Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S., 155, 167.)

In *United States* v. *Macdaniel* (7 Pet., 1, 15) it is said:

> A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law, but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the Government.

DUE PROCESS OF LAW.

It is urged, however, by the appellants that inasmuch as the rules and regulations in question do not provide for a hearing in court they are invalid and can

not be enforced, because in violation of that provision of the 5th amendment to the Federal Constitution which prescribes that no person shall be deprived of property without due process of law.

The appellants' live stock, as has been seen, is unlawfully within the nation; that is, it is there without the permission of the Chickasaw tribe. The tribe has the same right to remove the cattle of the appellants as tenants in common of a farm would have the right to remove intruders therefrom. It is settled law that a person, upon finding an animal trespassing in his field, may turn the beast out, using no more force than is necessary. (Waterman on Trespass, vol. 2, sec. 889.)

The method prescribed for removing the appellants and their live stock as intruders from the Chickasaw Nation is the administrative process for the execution of the power conferred by Congress upon the Interior Department and is as much due process of law as judicial process.

In *United States* v. *Mullin* (71 Fed. Rep., 682) the question was raised as to whether an order issued by an Indian agent to the Indian police to remove certain white persons from the lands occupied by members of the Winnebago tribe of Indians was a legal writ. The court, among other things, said:

> By the express terms of the treaty of March 8, 1865 [with the Winnebago Indians], and by the provisions of sections 2114, 2118, 2119, and 2149 of the Revised Statutes, the executive department is charged with the duty of removing all intruders from the Winnebago Reservation

> and protecting the Indians in the use and occupancy of the reservation; and by the rules and regulations of the Department of the Interior, as well as by the express provisions of section 2119, the Indian agent is the officer charged with the performance of this duty, and an order in writing by him issued to secure the performance of the duty thus imposed upon him as an executive officer of the Government, being an order requiring obedience upon the part of all within its terms, is therefore a legal writ, and anyone who willfully obstructs or resists an officer of the United States in the service or execution of such an order is guilty of the offense defined in section 5398, to wit, of obstructing or resisting the service or an execution of a legal writ.

In the same connection (on p. 688) the court said:

> Whenever, by the provisions of the Constitution, or of a treaty made in pursuance thereof, or of an act of Congress, the executive department of the Government is charged with the performance of some duty or obligation, and to secure due performance thereof it becomes necessary that certain action be taken, and the executive department, acting through the proper channel, issues a written order or mandate requiring the doing of the appropriate act and directing a proper person to execute such mandate or command, such a writing is, in my judgment, a legal writ within the meaning of the section of the statute now under consideration.

In *Weimer* v. *Bunbury* (30 Mich., 201) Judge Cooley, at page 215, says:

> A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for the purpose, and this is supposed to give him ample protection. To require that the action of the Government, in every instance where it touches the right of the individual citizen, shall be preceded by a judicial order or sentence after a hearing, would be to give to the judiciary a supremacy in the state, and seriously to impair and impede the efficiency of executive action.

Any legal process which is founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent is due process of law. (*State* v. *Allen*, 2 McCord, 55; *Murray* v. *Hoboken*, etc., 18 How., 272; *Lovell* v. *Seeback*, 45 Minn., 463.)

The method complained of is founded in necessity. It was approved by the judicial department of the Government as early as 1858. (See *New York* v. *Dibble*, 21 How., 366, 370.) It has been uniformly followed by the executive department. (See Ops. Attys. Gen., already cited; *Eells* v. *Ross*, *supra;* *Flournoy* v. *Beck*, *supra;* Proclamation of President Cleveland, 24 Stat., 1023.) It has been sanctioned by the legislative department (see Senate Reports of Committees, 45th Cong., third session, vol. 2, Rept. No. 698, pp. 1–4) and it has been acquiesced in by universal consent.

That the method is due process of law, see also *Mehlin* v. *Ice, supra; Lindsay* v. *Mullen, supra* (p. 146); *Kloski et al.* v. *Ellis et al.* (unreported); opinion by Townsend, United States judge, Indian Territory, copy of which opinion will be furnished the court if desired by it.

In *New York* v. *Dibble* (*supra*) it was held (p. 370) that a statute which provided for the summary removal of white men who intruded upon lands set apart for the use of an Indian tribe was not invalid.

In *Echols* v. *Tate* (53 Ark., 12) it is held that an order of an Indian agent to remove an intruder is the order of the President and is legal.

In *Mehlin* v. *Ice* (*supra*, p. 313) it was held that a law of the Cherokee Nation prescribing a summary method of ejecting an unlawful occupant of land is not to be regarded as in conflict with the provision of the fifth amendment relative to due process of law.

In *Lovell* v. *Seeback* (45 Minn., 465, 467) a statute authorizing the chairman of the board of county commissioners to order the removal to the county of their legal settlement of poor persons who have applied for public support in another county, and are likely to become chargeable thereon for support, and who, after warning to depart therefrom, are unable or have refused to do so, was held to be constitutional and to justify removals where the facts are such as are specified in the statute.

In the course of the opinion it was stated as follows:

> It is to be taken as admitted that the facts were such as the statute contemplates as justify-

ing an order of removal; and the question is whether it is within the power of the legislature to enact a law to the effect that when a poor person, having a legal settlement in some county in this State, but temporarily being in another county, applies for public support therein, and, being in destitute circumstances, is likely to become chargeable for public support in that county, the county commissioners of that county, or their chairman, may lawfully cause such person, after he shall have refused to depart, to be removed to the county of his legal settlement, without judicial proceedings, without notice to such person of the contemplated removal, and without opportunity to be heard in respect thereto. Would this be an interference with the right of personal liberty "without due process of law?"

We shall confine our decision strictly to the case here presented, which, as it will be observed, does not involve an inquiry as to the power of the county commissioners, by their ex parte proceedings, to conclude the person removed in regard to any fact upon which the order of removal may be based. We do not decide whether under this statute the county commissioners have any power to finally determine any such questions. Though it be conceded that they have not, it would not follow that the statute may not be sustained in its application to a case where the facts are shown or admitted to be such as are specified in the law as reasons justifying removal. Many illustrations may be given of cases where the law, either common or statute, justifies an act or

course of conduct by a private person or a public officer, under particular circumstances, which would be illegal except under such circumstances. In such cases the person or officer must accept whatever risk there may be of being held responsible if the facts should not prove to be such as to legally justify his conduct. The abatement of nuisances by a private person, although attended with an interference with or even the destruction of the property of another; the levy of distress for rent at common law and under statutes; the distress of goods for taxes; the taking up and disposing of estrays; the arrest without warrant of one engaged in the commission of a felony; a traveler on a public highway going upon the adjacent land when necessary to avoid an obstruction rendering the highway impassable, are some of the many instances in which the principle referred to prevails. Whether in such case the interference with the person or property of another, without any previous adjudication concerning his rights, is justified by the law or not, depends upon the facts, among others, as to whether a nuisance exists; whether rent is due or taxes unpaid; whether animals taken up as estrays are in fact such; whether the person arrested is in fact committing a felony; whether the highway is impassable. Such illustrations, and others which might be mentioned, especially cases involving the exercise of the general police power of the State, show that, both according to the ancient principles of the common law and by statute, a person may, under some

> circumstances, be lawfully deprived of his property, or temporarily restrained of his liberty, without any previous adjudication concerning his rights. The meaning of the phrase "due process of law" in the Constitution is not strictly limited to judicial process or proceedings.

In *Lindsay* v. *Mullen* (*supra*) the plaintiff had availed himself of a boom for the purpose of sending his logs down the river. The logs were seized, under summary process, for the enforcement of the payment of the charges for the use of the boom. In answer to plaintiff's contention that such seizure was not due process of law, the Supreme Court of the United States said:

> When he decides to avail himself of the boom, it can not be said that he is deprived of his property without due process of law if he is compelled to subject it to the conditions which the legislature prescribes for the use of such boom.

EIGHTH PROPOSITION.

Plaintiffs acquired no right to pasture their live stock within the boundaries of the nation by reason of any permission given by or by reason of any contract or contracts made with individual members thereof.

The contention of the appellants to the contrary of the above proposition is based entirely upon the provisions in sections 16 and 23 of the so-called Curtis bill, which recognizes the right of a member of the tribe, pending allotment, to keep and use his proportionate share of the land and to lease the same and receive the rental; and the amendment of March 3, 1901 (31 Stat., 1447), to the sixth section of the act of February 8, 1887 (24 Stat., 388-390), which declares every Indian in the Indian Territory to be a citizen of the United States.

The Chickasaw lands have not yet been allotted to individual members of the tribe. The lands are public lands in that they are the property of the Chickasaw tribe. (*Stephens* v. *Chickasaw Nation*, 174 U. S., 445, 488.) These lands remain subject to the administrative control of the Interior Department, notwithstanding the provisions of the Curtis bill, above referred to, and notwithstanding that the act of March 3, 1901, invested these Indians with the rights and privileges of citizens of the United States. (*Cherokee Nation* v. *Hitchcock*, decided by the Supreme Court of the United States December 1, 1902; *United States* v. *Rickert*, decided February 23, 1903.)

Individual members of the Chickasaw Nation, even though they had complete title and full dominion over their proportionate share of allotments, have no more right, as against a law of the nation, to authorize appellants to go therein with their live stock and occupy their lands than a citizen of the United States, owner of property, would have to authorize a Chinaman to enter and remain within the boundaries of the United States, as against the objections of the Government as expressed in the Chinese-exclusion act.

When a nonmember of the tribe is within the boundaries of the nation lawfully—that is, by permission of the tribe—a member of the tribe may rent his proportionate share of the tribal lands to such nonmember. To this extent and no further do the provisos in sections 16 and 23 go.

It is urged in appellants' brief, with apparent seriousness, that it is the duty of this court to declare the act

of the Chickasaw Nation and the rules and regulations in question to be invalid because the white intruders within the Indian Territory exceed by several hundred thousand the Indian population, and that in the Chickasaw Nation alone the white intruders number more than 130,000, while there are only seven or eight thousand Indians. These facts, if they be such, would seem to be a strong argument in favor of continuing the policy of governmental protection and one that had appealed to Congress in the framing of the Curtis bill. Says Justice Miller in the Kagama case (118 U. S., 383, 384):

> These Indian tribes are the wards of the nation. They are communities *dependent* on the United States—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress whenever the question has arisen.

* * * * *

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of

> those among whom they dwell. It must exist in that Government because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The above case was referred to by the Supreme Court of the United States as late as February 23, 1903, in *United States* v. *Rickert* (187 U. S., —), and the principles as set forth in the language just quoted approved.

For what purpose we do not know, appellants, in their brief, have gone outside of the record and discussed matters relating to the Indian Bureau and its action, but which are not in issue here. Such matters will not be noticed in this brief.

We respectfully submit that the record in this case shows no error, and the decree of the lower court sustaining appellee's demurrer should be affirmed.

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